

UNITED STATES DEPARTMENT OF THE INTERIOR  
WASHINGTON, D.C. 20240

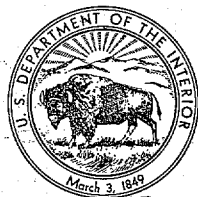
Secretary of the Interior.....Thomas S. Kleppe

Office of Hearings and Appeals....James R. Richards, *Director*

Office of the Solicitor....H. Gregory Austin, *Solicitor*

**DECISIONS  
OF THE  
UNITED STATES  
DEPARTMENT OF THE INTERIOR**

EDITED BY  
VERA E. BURGIN  
CAROL NICHOLSON  
BETTY PERRY



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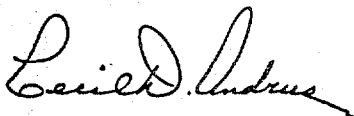
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## PREFACE

This volume of Decisions of the Department of the Interior covers the period from January 1, 1976 to December 31, 1976. It includes the most important administrative decisions and legal opinions that were rendered by officials of the Department during the period.

The Honorable Thomas S. Kleppe, served as Secretary of the Interior during the period covered by this volume; Mr. Kent Frizzell served as Under Secretary; Messrs. Jack Carlson, James T. Clarke, Jack O. Horton, Royston C. Hughes, John Kyl, Nathaniel P. Reed served as Assistant Secretaries of the Interior; Mr. H. Gregory Austin served as Solicitor. Mr. James R. Richards, served as Director, Office of Hearings and Appeals.

This volume will be cited within the Department of the Interior as "83 I.D."



*Cecil D. Andrus*  
Secretary of the Interior.

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## ERRATA:

- Page 1—Correct spelling in deciding date should be *January*.
- Page 23—Delete punctuation preceding decided date in *Pierresteguy decision*.
- Page 68—Right col., line 3, correct 1957 to 1975.
- Page 74—Right col., par. 2, line 3, correct *affirmed*.
- Page 94—Left col., under *Discussion*, line 11, correct legal citation par. to read 16,618.
- Page 117—Right col., par. 2, line 7, legal citation should read 82 I.D. 362.
- Page 145—Right col., par. 2, line 6, correct date should read July 24, 1971.
- Page 220—Right col., syllabus par. line 1, correct spelling *administrative*.
- Page 226—Right col., par. 1, line 15—Citation for Bishop Coal Co., should read 82 I.D. 553.
- Page 255—Left col., quoted text, line 8, correct date to read Oct. 1 to Oct. 21, 1970.
- Page 281—Syllabus No. 4, line 4 should read "purchaser" of two other 320 acre en- \* \* \* delete are subject to cancella-.
- Page 303—Footnote 1, line 5 from the bottom, correct legal citation to read IBCA 978-11-72.
- Page 338—Right col., line 4, correct citation vol. from 432 to 532.
- Page 418—Footnote 2, Rushton Mining Co., 5 IBMA 367, delete 1.
- Page 421—Left col., topic *Issues on Appeal*, par. 1, line 5, correct 54 to 43 CFR.
- Page 428—Footnote 5, line 16, correct citation for Bishop Coal Co., 82 I.D. 553.
- Pages 462, 463—Syllabi Nos. 4, 5, 6 Topical Headings should read Alaska: Land Grants and Selections: *Mental Health Lands*.
- Page 476—Right col., line 6 of par. 1, correct 80 Stat. 1145 to 89 Stat. 1145.
- Page 489—Par. beginning "Protraction diagram" citation reads 43 CFR 2650-5(1) correct to read 2650.0-5(1).
- Page 523—Left col., line 6, correct edition date should read (1957).
- Page 598—Right col., par. 4, line 1 correct the word *original*.
- Page 708—Right col., par [1], line 7, correct legal citation par. to read 19,224.

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The table below sets out in alphabetical order, arranged according to the last name of the first party named in the Department's decision, all the departmental decisions published in the Interior Decisions, beginning with volume 61, judicial review of which was sought by one of the parties concerned. The name of the action is listed as it appears on the court docket in each court. Where the decision of the court has been published, the citation is given, if not, the docket number and date of final action taken by the court is set out. If the court issued an opinion in a nonreported case, that fact is indicated; otherwise no opinion was written. Unless otherwise indicated, all suits were commenced in the United States District Court for the District of Columbia and, if appealed, were appealed to the United States Court of Appeals for the District of Columbia Circuit. Finally, if judicial review resulted in a further departmental decision, the departmental decision is cited. Actions shown are those taken prior to the end of the year covered by this volume.

*Adler Construction Co.*, 67 I.D. 21 (1960) (Reconsideration)

*Adler Construction Co. v. U.S.*, Cong. 10-60. Dismissed, 423 F. 2d 1362 (1970); rehearing denied, July 15, 1970; *cert. denied*, 400 U.S. 993 (1970); rehearing denied, 401 U.S. 949 (1971).

*Adler Construction Co. v. U.S.*, Cong. 5-70. Trial Commr's. report accepting & approving the stipulated agreement filed September 11, 1972.

*Administrative Appeal of Ruth Pinto Lewis v. Superintendent of the Eastern Navajo Agency*, 4 IBIA 147; 82 I.D. 521 (1975)

*Ruth Pinto Lewis, Individually & as the Administratrix of the Estate of Ignacio Pinto v. Thomas S. Kleppe, Secretary of the Interior, & U.S.*, Civil No. CIV-76-223 M, D. N.W. Suit pending.

*Estate of John J. Akers*, 1 IBIA 8; 77 I.D. 268 (1970)

*Dolly Cusker Akers v. The Dept. of the Interior*, Civil No. 907, D. Mont. Judgment for defendant, September 17, 1971; order staying execution of judgment for 30 days issued October 15, 1971; appeal dismissed for lack of prosecution, May 3, 1972; appeal reinstated, June 29, 1972; *aff'd.*, 499 F. 2d 44 (9th Cir. 1974).

*State of Alaska, Andrew Kalerak, Jr.*, 73 I.D. 1 (1966)

*Andrew J. Kalerak, Jr., et al. v. Stewart L. Udall*, Civil No. A-35-66, D. Alas. Judgment for plaintiff, October 20, 1966; rev'd, 396 F. 2d 746 (9th Cir. 1968); *cert. den.*, 393 U.S. 1118 (1969).

*Allied Contractors, Inc.*, 68 I.D. 145 (1961)

*Allied Contractors, Inc. v. U.S.*, Ct. Cl. 163-64. Stipulation of settlement filed March 3, 1967; compromised.

*Leslie N. Baker, et al.*, A-28454 (October 26, 1960). On reconsideration *Autrice C. Copeland*, 69 I.D. 1 (1962)

*Autrice Copeland Freeman v. Stewart L. Udall*, Civil No. 1578, D. Ariz. Judgment for defendant, September 3, 1963 (opinion); *aff'd.*, 336 F. 2d 706 (9th Cir. 1964); no petition.

*Max Barash, The Texas Co.*, 63 I.D. 51 (1956)

*Max Barash v. Douglas McKay*, Civil No. 939-56. Judgment for defendant, June 13, 1957; rev'd & remanded, 256 F. 2d 714 (1958); judgment for plaintiff, December 18, 1958. Supplemental decision, 66 I.D. 11 (1959); no petition.

*Barnard-Curtiss Co.*, 64 I.D. 312 (1957); 65 I.D. 49 (1958)

*Barnard-Curtiss Co. v. U.S.*, Ct. Cl. No. 491-59. Judgment for plaintiff, 301 F. 2d 909 (1962).

*Eugenia Bate*, 69 I.D. 230 (1962)

*Katherine S. Foster & Brook H. Duncan, II v. Stewart L. Udall*, Civil No. 5258, D. N.M. Judgment for defendant, January 8, 1964; rev'd., 335 F. 2d 828 (10th Cir. 1964); no petition.

*Robert L. Beery, et al.*, 25 IBLA 287; 83 I.D. 249 (1976)

*J. A. Steele, et al. v. Thomas S. Kleppe in his capacity as Secretary of the Interior, & U.S.*, Civil No. C76-1840, ND. Cal. Suit Pending.

*Sam Bergesen*, 62 I.D. 295 (1955)

Reconsideration denied, IBCA-11 (December 19, 1955)

*Sam Bergesen v. U.S.*, Civil No. 2044, D. Wash. Complaint dismissed March 11, 1958; no appeal.

*Bishop Coal Company*, 82 I.D. 553 (1975)

*William Bennett, Paul F. Goad & United Mine Workers v. Thomas S. Kleppe, Secretary of the Interior*, No. 75-2158, United States Ct. of Appeals, D.C. Cir. Suit pending.

*BLM-A-045569*, 70 I.D. 231 (1963)

*New York State Natural Gas Corp. v. Stewart L. Udall*, Civil No. 2109-63. *Consolidated Gas Supply Corp. v. Stewart L. Udall, et al.*, Civil No. 2109-63. Judgment for defendant, September 20, 1965; Per curiam decision, *aff'd.*, April 28, 1966; no petition.

*Melvin A. Brown*, 69 I.D. 131 (1962)

*Melvin A. Brown v. Stewart L. Udall*, Civil No. 3352-62. Judgment for defendant; September 17, 1963; rev'd., 335 F. 2d 706 (1964); no petition.

*R. C. Buch*, 75 I.D. 140 (1968)

*R. C. Buch v. Stewart L. Udall*, Civil No. 68-1358-PH, C.D. Cal. Judgment for plaintiff, 298 F. Supp. 381 (1969); rev'd, 449 F. 2d 600 (9th Cir. 1971); judgment for defendant, March 10, 1972.

*The California Co.*, 66 I.D. 54 (1959)

*The California Co. v. Stewart L. Udall*, Civil No. 980-59. Judgment for defendant, 187 F. Supp. 445 (1960); aff'd., 296 F. 2d 384 (1961).

*In the Matter of Cameron Parish, Louisiana, Cameron Parish Police Jury & Cameron Parish School Board*, June 3, 1968 appealed by Secretary July 5, 1968, 75 I.D. 289 (1968)

*Cameron Parish Police Jury v. Stewart L. Udall, et al.*, Civil No. 14-206, W.D. La. Judgment for plaintiff, 302 F. Supp. 639 (1969); order vacating prior order issued November 5, 1969.

*Carson Construction Co.*, 62 I.D. 422 (1955)

*Carson Construction Co. v. U.S.*, Ct. Cl. No. 487-59. Judgment for plaintiff, December 14, 1961; no appeal.

*Chargeability of Acreage Embraced in Oil and Gas Lease Offers*, 71 I.D. 337 (1964), *Shell Oil Co.*, A-30575 (October 31, 1966)

*Shell Oil Co. v. Udall*, Civil No. 216-67. Stipulation of dismissal filed August 19, 1968.

*Chemi-Cote Perlite Corp. v. Arthur C. W. Bowen*, 72 I.D. 403 (1965)

*Bowen v. Chemi-Cote Perlite*, No. 2 CA-Civ. 248, Ariz. Ct. App. Decision against the Dept. by the lower court aff'd., 423 P. 2d 104 (1967); rev'd., 432 P. 2d 435 (1967).

*Stephen H. Clarkson*, 72 I.D. 138 (1965)

*Stephen H. Clarkson v. U.S.*, Cong. Ref. 5-68 Trial Commr's. report adverse to U.S. issued December 16, 1970; Chief Commr's. report concurring with the Trial Commr's. report issued April 13, 1971. P.L. 92-108 enacted accepting the Chief Commr's. report.

*Appeal of COAC, Inc.*, 81 I.D. 700 (1974)

*COAC, Inc. v. U.S.*, Ct. Cl. No. 395-75. Suit pending.

*Mrs. Hannah Cohen*, 70 I.D. 188 (1963)

*Hannah and Abram Cohen v. U.S.*, Civil No. 3158, D. R. I. Compromised.

*Barney R. Colson*, 70 I.D. 409 (1963)

*Barney R. Colson, et al. v. Stewart L. Udall*, Civil No. 63-26-Civ.-Oc. M.D. Fla. Dismissed with prejudice, 278 F. Supp. 826 (1968); aff'd., 428 F. 2d 1046 (5th Cir. 1970); cert. denied, 401 U.S. 911 (1971).

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*Columbian Carbon Co., Merwin E. Liss*, 63 I.D. 166 (1956)

*Merwin E. Liss v. Fred A. Seaton*, Civil No. 3233-56. Judgment for defendant, January 9, 1958; appeal dismissed for want of prosecution, September 18, 1958, D.C. Cir. No. 14,647.

*Appeal by the Confederated Salish & Kootenai Tribes of the Flathead Reservation, in the Matter of the Enrollment of Mrs. Elverna Y. Clairmont Baciarelli*, 77 I.D. 116 (1970)

*Elverna Yevonne Clairmont Baciarelli v. Rogers C. B. Morton*, Civil No. C-70-2200-SC, D. Cal. Judgment for defendant, August 27, 1971; aff'd., 481 F. 2d 610 (9th Cir. 1973); no petition.

*Appeal of Continental Oil Co.*, 68 I.D. 337 (1961)

*Continental Oil Co. v. Stewart L. Udall, et al.*, Civil No. 366-62. Judgment for defendant, April 29, 1966; aff'd., February 10, 1967; cert. den., 389 U.S. 839 (1967).

*Estate of Hubert Franklin Cook*, 5 IBIA 42; 83 I.D. 75 (1976)

*Leroy V. & Roy H. Johnson, Marlene Johnson Exendine & Ruth Johnson Jones v. Thomas S. Kleppe, Secretary of the Interior*, Civil No. CIV-76-0362-E, W.D. Okla. Suit pending.

*Autrice C. Copeland*,

*See* Leslie N. Baker *et al.*

*E. L. Cord, Donald E. Wheeler, Edward D. Neuhoﬀ*, 80 I.D. 301 (1973)

*Edward D. Neuhoﬀ & E. L. Cord v. Rogers C. B. Morton, Secretary of the Interior*, Civil No. R-2921, D. Nev. Dismissed, Sept. 12, 1975 (opinion); appeal docketed, Nov. 14, 1975.

*Appeal of Cosmo Construction Co.*, 73 I.D. 229 (1966)

*Cosmo Construction Co., et al. v. U.S.*, Ct. Cl. 119-68. Ct. opinion setting case for trial on the merits issued March 19, 1971.

*Estate of Jonah Crosby (Deceased Wisconsin Winnebago Unallotted)*, 81 I.D. 279 (1974)

*Robert Price v. Rogers C. B. Morton, Individually & in his official capacity as Secretary of the Interior & his successors in office, et al.*, Civil No. 74-0-189, D. Neb. Remanded to the Secretary for further administrative action, December 16, 1975.

*John C. deArmas, Jr., P. A. McKenna*, 63 I.D. 82 (1956)

*Patrick A. McKenna v. Clarence A. Davis*, Civil No. 2125-56. Judgment for defendant, June 20, 1957; aff'd., 259 F. 2d 780 (1958); cert. denied, 358 U.S. 385 (1958).

*The Dredge Corp.*, 64 I.D. 368 (1957); 65 I.D. 336 (1958)

*The Dredge Corp. v. J. Russell Penny*, Civil No. 475, D. Nev. Judgment for defendant, September 9, 1964; aff'd., 362 F. 2d 889 (9th Cir. 1966); no petition. *See also*, *Dredge Co. v. Husite Co.*, 369 P. 2d 676 (1962); cert. den., 371 U.S. 821 (1962).

*Eastern Associated Coal Corp.*, 82 I.D. 22 (1975)

*International Union of United Mine Workers of America v. Rogers C. B. Morton, Secretary of the Interior*, No. 75-1107, United States Ct. of Appeals D.C. Cir. Dismissed by stipulation, October 29, 1975.

*Eastern Associated Coal Corp.*, 82 I.D. 311 (1975)

*United Mine Workers of America v. Interior Board of Mine Operations Appeals*, No. 75-1727, United States Ct. of Appeals, D.C. Cir. Petition for Review withdrawn, July 28, 1975.

*Appeal of Ekhtutna, Inc.*, 1 ANCAB 165; 83 I.D. 500 (1976)

*State of Alaska v. Alaska Native Claims Appeal Board, et al.*, Civil No. A76-236, D. Alas. Suit pending.

*David H. Evans v. Ralph C. Little*, A-31044 (April 10, 1970), 1 IBLA 269; 78 I.D. 47 (1971)

*David H. Evans v. Rogers C. B. Morton*, Civil No. 1-71-41, D. Idaho. Order granting motion of Ralph C. Little for leave to intervene as a party defendant issued June 5, 1972. Judgment for defendants, July 27, 1973; aff'd., March 12, 1975; no petition.

*John J. Farrelly, et al.*, 62 I.D. 1 (1955)

*John J. Farrelly & The Fifty-One Oil Co. v. Douglas McKay*, Civil No. 3037-55. Judgment for plaintiff, October 11, 1955, no appeal.

*T. Jack Foster*, 75 I.D. 81 (1968)

*Gladys H. Foster, Executrix of the estate of T. Jack Foster v. Stewart L. Udall, Boyd L. Rasmussen*, Civil No. 7611, D. N.M. Judgment for plaintiff, June 2, 1969; no appeal.

*Franco Western Oil Co., et al.*, 65 I.D. 316, 427 (1958)

*Raymond J. Hansen v. Fred A. Seaton*, Civil No. 2810-59. Judgment for plaintiff, August 2, 1960 (opinion); no appeal.

See *Safarik v. Udall*, 304 F. 2d 944 (1962); cert. denied, 371 U.S. 901 (1962).

*Gabbs Exploration Co.*, 67 I.D. 160 (1960)

*Gabbs Exploration Co. v. Stewart L. Udall*, Civil No. 219-61. Judgment for defendant, December 1, 1961; aff'd., 315 F. 2d 37 (1963); cert. den., 375 U.S. 822 (1963).

*Estate of Temens (Timens) Vivian Gardafee*, 5 IBIA 113; 83 I.D. 216 (1976)

*Confederated Tribes & Bands of the Yakima Indian Nation v. Thomas Kleppe, Secretary of the Interior, & Erwin Ray*, Civil No. C-76-200, E.D. Wash. Suit pending.

*Stanley Garthofner, Duvall Bros.*, 67 I.D. 4 (1960)

*Stanley Garthofner v. Stewart L. Udall*, Civil No. 419-60. Judgment for plaintiff, November 27, 1961; no appeal.

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*Estate of Gei-kaun-mah (Bert)*, 82 I.D. 408 (1975)

*Juanita Geikaunmah Mammedaty & Imogene Geikaunmah Carter v. Rogers C. B. Morton, Secretary of the Interior*, Civil No. CIV 75-1010-E, W.D. Okla. Judgment for defendant, April 23, 1976.

*General Excavating Co.*, 67 I.D. 344 (1960)

*General Excavating Co. v. U.S.*, Ct. Cl. No. 170-62. Dismissed with prejudice December 16, 1963.

*Nelson A. Gerttula*, 64 I.D. 225 (1957)

*Nelson A. Gerttula v. Stewart L. Udall*, Civil No. 695-60. Judgment for defendant, June 20, 1961; motion for rehearing denied, August 3, 1961; aff'd., 309 F. 2d 653 (1962); no petition.

*Charles B. Gonsales, et al. Western Oil Fields, Inc., et al.*, 69 I.D. 236 (1962)

*Pan American Petroleum Corp. & Charles B. Gonsales v. Stewart L. Udall*, Civil No. 5246, D. N.M. Judgment for defendant, June 4, 1964; aff'd., 352 F. 2d 32 (10th Cir. 1965); no petition.

*James C. Goodwin*, 80 I.D. 7 (1973)

*James C. Goodwin v. Dale R. Andrus, State Dir., Bureau of Land Management, Burton W. Silcock, Dir., Bureau of Land Management, & Rogers C. B. Morton, Secretary of the Interior*, Civil No. C-5105, D. Colo. Dismissed, November 29, 1975 (opinion), appeal dismissed, March 9, 1976.

*Gulf Oil Corp.*, 69 I.D. 30 (1962)

*Southwestern Petroleum Corp. v. Stewart L. Udall*, Civil No. 2209-62. Judgment for defendant, October 19, 1962; aff'd., 325 F. 2d 633 (1963); no petition.

*Guthrie Electrical Construction*, 62 I.D. 280 (1955), IBCA-22 (Supp.) (March 30, 1956)

*Guthrie Electrical Construction Co. v. U.S.*, Ct. Cl. No. 129-58. Stipulation of settlement filed September 11, 1958. Compromised offer accepted and case closed October 10, 1958.

*L. H. Hagood, et al.*, 65 I.D. 405 (1958)

*Edwin Still, et al. v. U.S.*, Civil No. 7897, D. Colo. Compromise accepted.

*Raymond J. Hansen, et al.*, 67 I.D. 362 (1960)

*Raymond J. Hansen, et al. v. Stewart L. Udall*, Civil No. 3902-60. Judgment for defendant, June 23, 1961; aff'd., 304 F. 2d 944 (1962); cert. den., 371 U.S. 901 (1962).

*Robert Schulein v. Stewart L. Udall*, Civil No. 4131-60. Judgment for defendant, June 23, 1961; aff'd., 304 F. 2d 944 (1962); no petition.

*Billy K. Hatfield, et al. v. Southern Ohio Coal Co.*, 82 I.D. 289 (1975)

*District 6 United Mine Workers of America, et al. v. U.S. Dept. of Interior Board of Mine Operations Appeals*, No. 75-1704, U.S. Court of Appeals, D.C. Cir. Suit pending.

*Kenneth Holt, an individual, etc.*, 68 I.D. 148 (1961)

*Kenneth Holt, etc. v. U.S.*, Ct. Cl. No. 162-62. Stipulated judgment, July 2, 1965.

*Hope Natural Gas Co.*, 70 I.D. 228 (1963)

*Hope Natural Gas Co. v. Stewart L. Udall*, Civil No. 2132-63.

*Consolidated Gas Supply Corp. v. Stewart L. Udall, et al.*, Civil No. 2109-63. Judgment for defendant, September 20, 1965; Per curiam decision, aff'd., April 28, 1966; no petition.

*Boyd L. Hulse v. William H. Griggs*, 67 I.D. 212 (1960)

*William H. Griggs v. Michael T. Solan*, Civil No. 3741, D. Idaho. Stipulation for dismissal filed May 15, 1962.

*Idaho Desert Land Entries—Indian Hill Group*, 72 I.D. 156 (1965),  
*U.S. v. Ollie Mae Shearman, et al.—Idaho Desert Land Entries—*  
*Indian Hill Group*, 73 I.D. 386 (1966)

*Wallace Reed, et al. v. Dept. of the Interior, et al.*, Civil No. 1-65-86, D. Idaho. Order denying preliminary injunction, September 3, 1965; dismissed, November 10, 1965; amended complaint filed, September 11, 1967.

*U.S. v. Raymond T. Michener, et al.*, Civil No. 1-65-93, D. Idaho. Dismissed without prejudice, June 6, 1966.

*U.S. v. Hood Corp., et al.*, Civil No. 1-67-97, S.D. Idaho.

Civil Nos. 1-65-86 & 1-67-97 consolidated. Judgment adverse to U.S., July 10, 1970; reversed, 480 F. 2d 634 (9th Cir. 1973); *cert. denied*, 414 U.S. 1064 (1973). Dismissed with prejudice subject to the terms of the Stipulation, August 30, 1976.

*Appeal of Inter\* Helo, Inc.*, IBCA-713-5-68 (December 30, 1969),  
82 I.D. 591 (1975)

*John Billmeyer, etc. v. U.S.*, Ct. Cl. No. 54-74. Remanded with instructions to admit evidence, May 30, 1975.

*Interpretation of the Submerged Lands Act*, 71 I.D. 20 (1964)

*Floyd A. Wallis v. Stewart L. Udall*, Civil No. 3089-63. Dismissed with prejudice, March 27, 1968.

*C. J. Iverson*, 82 I.D. 386 (1975)

*C. J. Iverson v. Kent Frizzell, Acting Secretary of the Interior & Dorothy D. Rupe*, Civil No. 75-106-Bldg, D. Mont. Stipulation for dismissal with prejudice, September 10, 1976.

*J. A. Terteling & Sons*, 64 I.D. 466 (1957)

*J. A. Terteling & Sons, Inc. v. U.S.*, Ct. Cl. No. 114-59. Judgment for defendant, 390 F. 2d 926 (1968); remaining aspects compromised.

*J. D. Armstrong Co.*, 63 I.D. 289 (1956)

*J. D. Armstrong, Inc. v. U.S.*, Ct. Cl. No. 490-56. Plaintiff's motion to dismiss petition allowed, June 26, 1959.

*M. G. Johnson*, 78 I.D. 107 (1971) *U.S. v. Menzel G. Johnson*, 16 IBLA 234 (1974)

*Menzel G. Johnson v. Rogers C. B. Morton, Secretary of the Interior, et al.*, Civil No. CN-LV-74-158, RDF, D. Nev. Suit pending.

*Estate of San Pierre Kilkakhan (Sam E. Hill)*, 1 IBIA 299; 79 I.D. 583 (1972), 4 IBIA 242 (1975), 5 IBIA 12 (1976)

*Christine Sam & Nancy Judge v. Thomas Kleppe, Secretary of the Interior*, Civil No. C-76-14, E.D. Wash. Suit pending.

*Anguita L. Kluentner, et al.*, A-30483, November 18, 1965

*See Bobby Lee Moore, et al.*

*Leo J. Kottas, Earl Lutzenhiser*, 73 I.D. 123 (1966)

*Earl M. Lutzenhiser and Leo J. Kottas v. Stewart L. Udall, et al.*, Civil No. 1371, D. Mont. Judgment for defendant, June 7, 1968; *aff'd*, 432 F. 2d 328 (9th Cir. 1970); no petition.

*Max L. Krueger, Vaughan B. Connelly*, 65 I.D. 185 (1958)

*Max L. Krueger v. Fred A. Seaton*, Civil No. 3106-58. Complaint dismissed by plaintiff, June 22, 1959.

*W. Dalton La Rue, Sr.*, 69 I.D. 120 (1962)

*W. Dalton La Rue, Sr. v. Stewart L. Udall*, Civil No. 2784-62. Judgment for defendant, March 6, 1963; *aff'd*, 324 F. 2d 428 (1963); *cert. den.*, 376 U.S. 907 (1964).

*L. B. Samford, Inc.*, 74 I.D. 86 (1967)

*L. B. Samford, Inc. v. U.S.*, Ct. Cl. No. 393-67. Dismissed, 410 F. 2d 782 (1969); no petition.

*Charles Lewellen*, 70 ID. 475 (1963)

*Bernard E. Darling v. Stewart L. Udall*, Civil No. 474-64. Judgment for defendant, October 5, 1964; appeal voluntarily dismissed, March 26, 1965.

*Milton H. Lichtenwalner, et al.*, 69 I.D. 71 (1962)

*Kenneth McGahan v. Stewart L. Udall*, Civil No. A-21-63, D. Alas. Dismissed on merits, April 24, 1964; stipulated dismissal of appeal with prejudice, October 5, 1964.

*Merwin E. Liss, et al.*, 70 I.D. 228 (1963)

*Hope Natural Gas Co. v. Stewart L. Udall*, Civil No. 2132-63.

*Consolidated Gas Supply Corp. v. Stewart L. Udall, et al.*, Civil No. 2109-63. Judgment for defendant, September 20, 1965; *per curiam dec.*, *aff'd*, April 28, 1966; no petition.

*Bess May Lutey*, 76 I.D. 37 (1969)

*Bess May Lutey, et al. v. Dept. of Agriculture, BLM, et al.*, Civil No. 1817, D. Mont. Judgment for defendant, December 10, 1970; no appeal.

*Elgin A. McKenna Executrix, Estate of Patrick A. McKenna*, 74 I.D. 133 (1967)

*Mrs. Elgin A. McKenna as Executrix of the Estate of Patrick A. McKenna, Deceased v. Udall*, Civil No. 2001-67. Judgment for defendant February 14, 1968; aff'd., 418 F. 2d 1171 (1969); no petition.

*Mrs. Elgin A. McKenna, Widow and Successor in Interest of Patrick A. McKenna, Deceased v. Walter J. Hickel, Secretary of the Interior, et al.*, Civil No. 2401, D. Ky. Dismissed with prejudice, May 11, 1970.

*A. G. McKinnon*, 62 I.D. 164 (1955)

*A. G. McKinnon v. U.S.*, Civil No. 9433, D. Ore. Judgment for plaintiff 178 F. Supp. 913 (1959); rev'd., 289 F. 2d 908 (9th Cir. 1961).

*Estate of Elizabeth C. Jensen McMaster*, 5 IBIA 61; 83 I.D. 145 (1976)

*Raymond C. McMaster v. U.S., Dept. of the Interior, Secretary of the Interior & Bureau of Indian Affairs*, Civil No. C76-129T, W.D. Wash. Suit pending.

*Wade McNeil, et al.*, 64 I.D. 423 (1957)

*Wade McNeil v. Fred A. Seaton*, Civil No. 648-58. Judgment for defendant, June 5, 1959 (opinion); rev'd., 281 F. 2d 931 (1960); no petition.

*Wade McNeil v. Albert K. Leonard, et al.*, Civil No. 2226, D. Mont. Dismissed, 199 F. Supp. 671 (1961); order, April 16, 1962.

*Wade McNeil v. Stewart L. Udall*, Civil No. 678-62. Judgment for defendant, December 13, 1963 (opinion); aff'd., 340 F. 2d 801 (1964); cert. den., 381 U.S. 904 (1965).

*Marathon Oil Co.*, 81 I.D. 447 (1974), *Atlantic Richfield Co., Marathon Oil Co.*, 81 I.D. 457 (1974)

*Marathon Oil Co. v. Rogers C. B. Morton, Secretary of the Interior, et al.*, Civil No. C 74-179, D. Wyo.

*Marathon Oil Co. v. Rogers C. B. Morton, Secretary of the Interior, et al.*, Civil No. C 74-180, D. Wyo.

*Atlantic Richfield Co. & Pasco, Inc. v. Rogers C. B. Morton, Secretary of the Interior, et al.*, Civil No. C 74-181, D. Wyo.

Actions consolidated; judgment for plaintiff, December 11, 1975; notice of appeal filed in Civil Nos. C 74-179 & 180, February 6, 1976.

*Salvatore Megna, Guardian, Philip T. Garigan*, 65 I.D. 33 (1958)

*Salvatore Megna, Guardian etc. v. Fred A. Seaton*, Civil No. 468-58. Judgment for plaintiff, November 16, 1959; motion for reconsideration denied, December 2, 1959; no appeal.

*Philip T. Garigan v. Stewart L. Udall*, Civil No. 1577 Tux., D. Ariz. Preliminary injunction against defendant, July 27, 1966; supplemental dec. rendered September 7, 1966; judgment for plaintiff, May 16, 1967; no appeal.

*Meva Corp.*, 76 I.D. 205 (1969)

*Meva Corp. v. U.S.*, Ct. Cl. No. 492-69. Judgment for plaintiff, 511 F. 2d 548 (1975).

*Duncan Miller, Louise Cuccia*, 66 I.D. 388 (1959)

*Louise Cuccia and Shell Oil Corp. v. Stewart L. Udall*, Civil No. 562-60. Judgment for defendant, June 27, 1961; no appeal.

*Duncan Miller*, 70 I.D. 1 (1963)

*Duncan Miller v. Stewart L. Udall*, Civil No. 931-63. Dismissed for lack of prosecution, April 21, 1966; no appeal.

*Duncan Miller, Samuel W. McIntosh*, 71 I.D. 121 (1964)

*Samuel W. McIntosh v. Stewart L. Udall*, Civil No. 1522-64. Judgment for defendant, June 29, 1965; no appeal.

*Duncan Miller*, A-30546 (August 10, 1966), A-30566 (August 11, 1966), and 73 I.D. 211 (1966)

*Duncan Miller v. Udall*, Civil No. C-167-66, D. Utah. Dismissed with prejudice, April 17, 1967; no appeal.

*Bobby Lee Moore, et al.*, 72 I.D. 505 (1965), *Anquita L. Kluentner, et al.*, A-30483 (November 18, 1965)

*Gary Carson Lewis, etc., et al. v. General Services Administration, et al.*, Civil No. 3253 S.D. Cal. Judgment for defendant, April 12, 1965; aff'd., 377 F. 2d 499 (9th Cir. 1967); no petition.

*Henry S. Morgan, et al.*, 65 I.D. 369 (1958)

*Henry S. Morgan v. Stewart L. Udall*, Civil No. 3248-59. Judgment for defendant, February 20, 1961 (opinion); aff'd., 306 F. 2d 799 (1962); cert. den., 371 U.S. 941 (1962).

*Morrison-Knudsen Co., Inc.*, 64 I.D. 185 (1957)

*Morrison-Knudsen Co., Inc. v. U.S.*, Ct. Cl. No. 239-61. Remanded to Trial Commr., 345 F. 2d 833 (1965); Commr.'s report adverse to U.S. issued June 20, 1967; judgment for plaintiff, 397 F. 2d 826 (1968); part remanded to the Board of Contract Appeals; stipulated dismissal on October 6, 1969; judgment for plaintiff, February 17, 1970.

*Navajo Tribe of Indians v. State of Utah*, 80 I.D. 441 (1973)

*Navajo Tribe of Indians v. Rogers C. B. Morton, Secretary of the Interior, Joan B. Thompson, Martin Ritvo & Frederick Fishman, members of the Board of Land Appeals, Dept. of the Interior*, Civil No. C-308-73, D. Utah. Suit pending.

*Richard L. Oelschlaeger*, 67 I.D. 237 (1960)

*Richard L. Oelschlaeger v. Stewart L. Udall*, Civil No. 4181-60. Dismissed, November 15, 1963; case reinstated, February 19, 1964; remanded, April 4, 1967; rev'd. & remanded with directions to enter judgment for appellant, 389 F. 2d 974 (1968); cert. den. 392 U.S. 909 (1968).

*Oil and Gas Leasing on Lands Withdrawn by Executive Orders for Indian Purposes in Alaska*, 70 I.D. 166 (1963)

*Mrs. Louise A. Pease v. Stewart L. Udall*, Civil No. 760-63, D. Alas. Withdrawn, April 18, 1963.

*Superior Oil Co. v. Robert L. Bennett*, Civil No. A-17-63, D. Alas. Dismissed, April 23, 1963.

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*U.S. v. Independent Quick Silver Co.*, 72 I.D. 367 (1965)

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*U.S. v. Frank & Wanita Melluzzo, et al.*, 76 I.D. 181 (1969), Reconsideration, 1 IBLA 37, 77 I.D. 172 (1970)

*WJM Mining & Development Co., et al. v. Rogers C. B. Morton*, Civil No. 70-679, D. Ariz. Judgment for defendant, December 8, 1971; dismissed, February 4, 1974.

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*U.S. v. Ollie Mae Shearman et al.*, 73 I.D. 386 (1966)

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 Maxwell and Sangre de Cristo Land Grants (46 L.D. 301); modified, 48 L.D. 88.  
 McBride v. Secretary of the Interior (8 C.L.O. 10); modified, 52 L.D. 33.  
 McCalla v. Acker (29 L.D. 203); vacated, 30 L.D. 277.  
 McCord, W. E. (23 L.D. 137); overruled to extent of any possible inconsistency, 56 I.D. 73.  
 McCornick, Williams S. (41 L.D. 661, 666); vacated, 43 L.D. 429.  
 \*McCraney v. Heirs of Hayes (33 L.D. 21); overruled so far as in conflict, 41 L.D. 119 (See 43 L.D. 196).  
 McDonald, Roy (34 L.D. 21); overruled, 37 L.D. 285.  
 \*McDonogh School Fund (11 L.D. 378); overruled, 30 L.D. 616 (See 35 L.D. 399).  
 McFadden *et al.* v. Mountain View Mining and Milling Co. (26 L.D. 530); vacated, 27 L.D. 358.  
 McGee, Edward D. (17 L.D. 285); overruled, 29 L.D. 166.  
 McGrann, Owen (5 L.D. 10); overruled, 24 L.D. 502.  
 McGregor, Carl (37 L.D. 693); overruled, 38 L.D. 148.  
 McHarry v. Stewart (9 L.D. 344); criticized and distinguished, 56 I.D. 340.  
 McKernan v. Bailey (16 L.D. 368); overruled, 17 L.D. 494.  
 \*McKittrick Oil Co. v. Southern Pacific R.R. Co. (37 L.D. 243); overruled so far as in conflict, 40 L.D. 528 (See 42 L.D. 317).

- McMiken, Herbert *et al.* (10 L.D. 97); 11 L.D. 96); distinguished, 58 I.D. 257, 260.
- McNamara *et al. v.* State of California (17 L.D. 296); overruled, 22 L.D. 666.
- McPeck *v.* Sullivan *et al.* (25 L.D. 281); overruled, 36 L.D. 26.
- \*Mee *v.* Hughtart *et al.* (23 L.D. 455); vacated, 28 L.D. 209. In effect reinstated, 44 L.D. 414, 487, 46 L.D. 434; 48 L.D. 195, 346, 348; 49 L.D. 660.
- Meeboer *v.* Heirs of Schut (35 L.D. 335); overruled so far as in conflict, 41 L.D. 119 (See 43 L.D. 196).
- Mercer *v.* Buford Townsite (35 L.D. 119); overruled, 35 L.D. 649.
- Meyer *v.* Brown (15 L.D. 307) (See 39 L.D. 162, 225).
- Meyer, Peter (6 L.D. 639); modified, 12 L.D. 436.
- Midland Oilfields Co. (50 L.D. 620); overruled so far as in conflict, 54 I.D. 371.
- Mikesell, Henry D., A-24112 (Mar. 11, 1946); *rehearing denied* (June 20, 1946), overruled to extent inconsistent, 70 I.D. 149 (1963).
- Miller, D. (60 I.D. 161); overruled in part, 62 I.D. 210.
- Miller, Duncan, A-29760 (Sept. 18, 1963), overruled, 79 I.D. 416 (1972).
- Miller, Duncan, A-30742 (December 2, 1966), overruled, 79 I.D. 416 (1972).
- Miller, Duncan, A-30722 (April 14, 1967), overruled, 79 I.D. 416 (1972).
- Miller, Edwin J. (35 L.D. 411); overruled, 43 L.D. 181.
- Miller *v.* Sebastian (19 L.D. 288); overruled, 26 L.D. 448.
- Milner and North Side R.R. Co. (36 L.D. 488); overruled, 40 L.D. 187.
- Milton *et al. v.* Lamb (22 L.D. 339); overruled, 25 L.D. 550.
- Milwaukee, Lake Shore and Western Ry. Co. (12 L.D. 79); overruled, 29 L.D. 112.
- Miner *v.* Mariott *et al.* (2 L.D. 709); modified, 28 L.D. 224.
- Minnesota and Ontario Bridge Company (30 L.D. 77); no longer followed, 50 L.D. 359.
- \*Mitchell *v.* Brown (3 L.D. 65); overruled, 41 L.D. 396 (See 43 L.D. 520).
- Monitor Lode (18 L.D. 358); overruled, 25 L.D. 495.
- Monster Lode (35 L.D. 493); overruled so far as in conflict, 55 I.D. 348.
- Moore, Charles H. (16 L.D. 204); overruled, 27 L.D. 482.
- Morgan *v.* Craig (10 C.L.O. 234); overruled, 5 L.D. 303.
- Morgan, Henry S. *et al.* (65 I.D. 369); overruled to extent inconsistent, 71 I.D. 22 (1964).
- Morgan *v.* Rowland (37 L.D. 90); overruled, 37 L.D. 618.
- Moritz *v.* Hinz (36 L.D. 450); vacated, 37 L.D. 382.
- Morrison, Charles S. (36 L.D. 126); modified, 36 L.D. 319.
- Morrow *et al. v.* State of Oregon *et al.* (32 L.D. 54); modified, 33 L.D. 101.
- Moses, Zelman R. (36 L.D. 473); overruled, 44 L.D. 570.
- Mountain Chief Nos. 8 and 9 Lode Claims (36 L.D. 100); overruled in part, 36 L.D. 551.
- Mountain Fuel Supply Company, A-31053 (December 19, 1969), overruled, 79 I.D. 416 (1972).
- Mt. Whitney Military Reservation (40 L.D. 315) (See 43 L.D. 33).
- Muller, Ernest (46 L.D. 243); overruled, 48 L.D. 163.
- Muller, Esberne K. (39 L.D. 72); modified, 39 L.D. 360.
- Mulnix, Philip, Heirs of (33 L.D. 331); overruled, 43 L.D. 532.
- Munsey, Glenn, Earnest Scott and Arnold Scott *v.* Smitty Baker Coal Company, Inc., 1 IBMA 144, 162 (Aug. 8, 1972), 79 I.D. 501, 509, distinguished, 80 I.D. 251 (1973).
- Myll, Clifton O., 71 I.D. 458 (1964); as supplemented, 71 I.D. 486 (1964), vacated, 72 I.D. 536 (1965).
- National Livestock Company and Zack Cox, I.G.D. 55 (1938), is overruled, United States *v.* Maher, Charles *et al.*, 5 IBLA 209, 79 I.D. 109 (1972).
- Naughton, Harold J., 3 IBLA 237, 78 I.D. 300 (1971); Schweite, Helena M., 14 IBLA 305 (Feb. 1, 1974) is distinguished by Kristeen J. Burke, Joe N. Melovedoff, Victor Melovedoff, 20 IBLA 162 (May 5, 1975).

# LXXXVI TABLE OF OVERRULED AND MODIFIED CASES

- Nebraska, State of (18 L.D. 124) ; overruled, 28 L.D. 358.
- Nebraska, State of *v. Dorrington* (2 C.L.L. 647) ; overruled, 26 L.D. 123.
- Neilsen *v. Central Pacific R.R. Co. et al.* (26 L.D. 252) ; modified, 30 L.D. 216.
- Newbanks *v. Thompson* (22 L.D. 490) ; overruled, 29 L.D. 108.
- Newton, Robert C. (41 L.D. 421) ; overruled so far as in conflict, 43 L.D. 364.
- New Mexico, State of (46 L.D. 217) ; overruled, 48 L.D. 98.
- New Mexico, State of (49 L.D. 314) ; overruled, 54 I.D. 159.
- Newton, Walter (22 L.D. 322) ; modified, 25 L.D. 188.
- New York Lode and Mill Site (5 L.D. 513) ; overruled, 27 L.D. 373.
- \*Nickel, John R. (9 L.D. 388) ; overruled, 41 L.D. 129 (See 42 L.D. 313).
- Northern Pacific R.R. Co. (20 L.D. 191) ; modified, 22 L.D. 234 ; overruled so far as in conflict, 29 L.D. 550.
- \*Northern Pacific R.R. Co. (21 L.D. 412, 23 L.D. 204 ; 25 L.D. 501) ; overruled, 53 I.D. 242 (See 26 L.D. 265 ; 33 L.D. 426 ; 44 L.D. 218 ; 117 U.S. 435).
- Northern Pacific R.R. Co. *v. Bowman* (7 L.D. 238) ; modified, 18 L.D. 224.
- Northern Pacific R.R. Co. *v. Burns* (6 L.D. 21) ; overruled, 20 L.D. 191.
- Northern Pacific R.R. Co. *v. Loomis* (21 L.D. 395) ; overruled, 27 L.D. 464.
- Northern Pacific R.R. Co. *v. Marshall et al.* (17 L.D. 545) ; overruled, 28 L.D. 174.
- Northern Pacific R.R. Co. *v. Miller* (7 L.D. 100) ; overruled so far as in conflict, 16 L.D. 229.
- Northern Pacific R.R. Co. *v. Sherwood* (28 L.D. 126) ; overruled so far as in conflict, 29 L.D. 550.
- Northern Pacific R.R. Co. *v. Symons* (22 L.D. 686) ; overruled, 28 L.D. 95.
- Northern Pacific R.R. Co. *v. Urquhart* (8 L.D. 365) ; overruled, 28 L.D. 126.
- Northern Pacific R.R. Co. *v. Walters et al.* (13 L.D. 230) ; overruled so far as in conflict, 49 L.D. 391.
- Northern Pacific R.R. Co. *v. Yantis* (8 L.D. 58) ; overruled, 12 L.D. 127.
- \*Northern Pacific Ry. Co. (48 L.D. 573) ; overruled so far as in conflict, 51 L.D. 196 (See 52 L.D. 58).
- Nunez, Roman C. and Serapio (56 I.D. 363) ; overruled so far as in conflict, 57 I.D. 213.
- Nyman *v. St. Paul, Minneapolis, and Manitoba Ry. Co.* (5 L.D. 396) ; overruled, 6 L.D. 750.
- O'Donnell, Thomas J. (28 L.D. 214) ; overruled, 35 L.D. 411.
- Olson *v. Traver et al.* (26 L.D. 350, 628) ; overruled so far as in conflict, 29 L.D. 480 ; 30 L.D. 382.
- Opinion A.A.G. (35 L.D. 277) ; vacated, 36 L.D. 342.
- Opinion of Acting Solicitor, June 6, 1941 ; overruled so far as inconsistent, 60 I.D. 333.
- \*Opinion of Acting Solicitor, July 30, 1942 ; overruled so far as in conflict, 58 I.D. 331 (See 59 I.D. 346, 350).
- Opinion of Associate Solicitor, Oct. 22, 1947 (M-34999) ; distinguished, 68 I.D. 433 (1961).
- Opinion of Associate Solicitor, M-36463, 64 I.D. 351 (1957) ; overruled, 74 I.D. 165 (1967).
- Opinion of Associate Solicitor, M-36512 (July 29, 1958) ; overruled to extent inconsistent, 70 I.D. 159.
- Opinion of Chief Counsel, July 1, 1914 (43 L.D. 339) ; explained, 68 I.D. 372 (1961).
- Opinion of Secretary, 75 I.D. 147 (1968) ; vacated, 76 I.D. 69 (1969).
- Opinion of Solicitor, October 31, 1917 (D-40462) ; overruled so far as inconsistent, 58 I.D. 85, 92, 96.
- Opinion of Solicitor, February 7, 1919 (D-44083) ; overruled, November 4, 1921 (M-6397) (See 58 I.D. 158, 160).
- Opinion of Solicitor, August 8, 1933 (M-27499) ; overruled so far as in conflict, 54 I.D. 402.
- Opinion of Solicitor, June 15, 1934 (54 I.D. 517) ; overruled in part, February 11, 1957 (M-36410).
- Opinion of Solicitor, Oct. 25, 1934, 55 I.D. 14, overruled so far as inconsistent, 77 I.D. 49 (1970).

- Opinion of Solicitor, May 8, 1940 (57 I.D. 124); overruled in part, 58 I.D. 562, 567.
- Opinion of Solicitor, August 31, 1943 (M-33183); distinguished, 58 I.D. 726, 729.
- Opinion of Solicitor, May 2, 1944 (58 I.D. 680); distinguished, 64 I.D. 141.
- Opinion of Solicitor, Oct. 22, 1947 (M-34999); distinguished, 68 I.D. 433 (1961).
- Opinion of Solicitor, March 28, 1949 (M-35093); overruled in part, 64 I.D. 70.
- Opinion of Solicitor, 60 I.D. 436 (1950); will not be followed to the extent that it conflicts with these views, 72 I.D. 92 (1965).
- Opinion of Solicitor, M-36051 (December 7, 1950), modified; Solicitor's Opinion, M-36863, 79 I.D. 513 (1972).
- Opinion of Solicitor, Jan. 19, 1956 (M-36378); overruled to extent inconsistent, 64 I.D. 57.
- Opinion of Solicitor, June 4, 1957 (M-36443); overruled in part, 65 I.D. 316.
- Opinion of Solicitor, July 9, 1957 (M-36442); withdrawn and superseded, 65 I.D. 386, 388.
- Opinion of Solicitor, Oct. 30, 1957, 64 I.D. 393 (M-36429); no longer followed, 67 I.D. 366 (1960).
- Opinion of Solicitor, 64 I.D. 351 (1957); overruled, M-36706, 74 I.D. 165 (1967).
- Opinion of Solicitor, 64 I.D. 435 (1957); will not be followed to the extent that it conflicts with these views M-36456 (Supp.) (Feb. 18, 1969), 76 I.D. 14 (1969).
- Opinion of Solicitor, July 29, 1958 (M-36512); overruled to extent inconsistent, 70 I.D. 159 (1963).
- Opinion of Solicitor, Oct. 27, 1958 (M-36531); overruled, 69 I.D. 110 (1962).
- Opinion of Solicitor, July 20, 1959 (M-36531, Supp.); overruled, 69 I.D. 110 (1962).
- Opinion of Solicitor, 68 I.D. 433 (1961); distinguished and limited, 72 I.D. 245 (1965).
- Opinion of Solicitor, M-36767 (Nov. 1, 1967) (supplementing, M-36599), 69 I.D. 195 (1962).
- Opinion of Solicitor, M-36735 (Jan. 31, 1968), is reversed and withdrawn, Relocation of Flathead Irrigation Project's Kerr Substation and Switchyard, M-36735 (Supp.), 83 I.D. 346 (1976).
- Opinions of Solicitor, September 15, 1914, and February 2, 1915; overruled, September 9, 1919 (D-43035, May Caramony) (See 58 I.D. 149, 154-156).
- Oregon and California R.R. Co. v. Puckett (39 L.D. 169); modified, 53 I.D. 264.
- Oregon Central Military Wagon Road Co. v. Hart (17 L.D. 480); overruled, 18 L.D. 543.
- Owens *et al.* v. State of California (22 L.D. 369); overruled, 38 L.D. 253.
- Pace v. Carstarphen *et al.*, (50 L.D. 369); distinguished, 61 I.D. 459.
- Pacific Slope Lode (12 L.D. 686); overruled so far as in conflict, 25 L.D. 518.
- Page, Ralph, 8 IBLA 435 (Dec. 22, 1972), explained; Sam Rosetti, 15 IBLA 288, 81 I.D. 251 (1974).
- Papina v. Alderson (1 B.L.P. 91); modified, 5 L.D. 256.
- Patterson, Charles E. (3 L.D. 260); modified, 6 L.D. 284, 624.
- Paul Jarvis, Inc., Appeal of (64 I.D. 285); distinguished, 64 I.D. 388.
- Paul Jones Lode (28 L.D. 120); modified, 31 L.D. 359.
- Paul v. Wiseman (21 L.D. 12); overruled, 27 L.D. 522.
- Pecos Irrigation and Improvement Co. (15 L.D. 470); overruled, 18 L.D. 168, 268.
- Pennock, Belle L. (42 L.D. 315); vacated, 43 L.D. 66.
- Perry v. Central Pacific R.R. Co. (39 L.D. 5); overruled so far as in conflict, 47 L.D. 304.
- Phebus, Clayton (48 L.D. 128); overruled so far as in conflict, 50 L.D. 281; overruled to extent inconsistent, 70 I.D. 159.
- Phelps, W. L. (8 C.L.O. 139); overruled, 2 L.D. 854.
- Phillips, Alonzo (2 L.D. 321); overruled, 15 L.D. 424.
- Phillips v. Breazeale's Heirs (19 L.D. 573); overruled, 39 L.D. 93.

## LXXXVIII TABLE OF OVERRULED AND MODIFIED CASES

- Phillips, Cecil H., A-30851 (November 16, 1967), overruled, 79 I.D. 416 (1972).
- Phillips, Vance W., 14 IBLA 79 (Dec. 11, 1973) is modified by Vance W. Phillips and Aelisa A. Burnham, 19 IBLA 211 (Mar. 21, 1975).
- Pieper, Agnes C. (35 L.D. 459); overruled, 43 L.D. 374.
- Pierce, Lewis W. (18 L.D. 328); vacated, 53 I.D. 447; overruled so far as in conflict, 59 I.D. 416, 442.
- Pietkiewicz *et al. v. Richmond* (29 L.D. 195); overruled, 37 L.D. 145.
- Pike's Peak Lode (10 L.D. 200); overruled in part, 20 L.D. 204.
- Pike's Peak Lode (14 L.D. 47); overruled, 20 L.D. 204.
- Poppo, James (12 L.D. 433); overruled, 13 L.D. 588.
- Powell, D. C. (6 L.D. 302); modified, 15 L.D. 477.
- Prange, Christ C. and William C. Braasch (48 L.D. 488); overruled so far as in conflict, 60 I.D. 417, 419.
- Premo, George (9 L.D. 70) (See 39 I.D. 162, 225).
- Prescott, Henrietta P. (46 L.D. 486); overruled, 51 L.D. 287.
- Pringle, Wesley (13 L.D. 519); overruled, 29 L.D. 599.
- Provansal, Victor H. (30 L.D. 616); overruled, 35 L.D. 399.
- Prue, Widow of Emanuel (6 L.D. 436); vacated, 33 L.D. 409.
- Pugh, F. M. *et al.* (14 L.D. 274); in effect vacated, 232 U.S. 452.
- Puyallup Allotment (20 L.D. 157); modified, 29 L.D. 628.
- Ramsey, George L., Heirs of Edwin C. Philbrick (A-16060), August 6, 1931, unreported; recalled and vacated, 58 I.D. 272, 275, 290.
- Rancho Alisal (1 L.D. 173); overruled, 5 L.D. 320.
- Ranger Fuel Corporation, 2 IBMA 163 (July 17, 1973), 80 I.D. 708; Set aside by Memorandum Opinion and Order Upon Reconsideration in Ranger Fuel Corporation, 2 IBMA 186 (September 5, 1973), 80 I.D. 604.
- Rankin, James D. *et al.* (7 L.D. 411); overruled, 35 L.D. 32.
- Rankin, John M. (20 L.D. 272); reversed, 21 L.D. 404.
- Rayburn, Ethel Cowgill, A-28866 (Sept. 6, 1962) is modified by T. T. Cowgill, *et al.*, 19 IBLA 274 (Apr. 7, 1975).
- Rebel Lode (12 L.D. 683); overruled, 20 L.D. 204; 48 L.D. 523.
- \*Reed *v. Buffington* (7 L.D. 154); overruled, 8 L.D. 110 (See 9 L.D. 360).
- Regione *v. Rosseler* (40 L.D. 93); vacated, 40 L.D. 420.
- Reid, Bettie H., Lucille H. Pipkin (61 I.D. 1); overruled, 61 I.D. 355.
- Reliable Coal Corp., 1 IBMA 50, 78 I.D. 199 (1971), distinguished, Zeigler Coal Corporation, 1 IBMA 71, 78 I.D. 362 (1971).
- Relocation of Flathead Irrigation Project's Kerr Substation and Switchyard, M-36735 (Jan. 31, 1968); is reversed and withdrawn, M-36735 (Supp.), 83 I.D. 346 (1976).
- Rialto No. 2 Placer Mining Claim (34 L.D. 44); overruled, 37 L.D. 250.
- Rico Town Site (1 L.D. 556); modified, 5 L.D. 256.
- Rio Verde Canal Co. (26 L.D. 381); vacated, 27 L.D. 421.
- Roberts *v. Oregon Central Military Road Co.* (19 L.D. 591); overruled, 31 L.D. 174.
- Robinson, Stella G. (12 L.D. 443); overruled, 13 L.D. 1.
- Rogers *v. Atlantic & Pacific R.R. Co.* (6 L.D. 565); overruled so far as in conflict, 8 L.D. 165.
- Rogers, Fred B. (47 L.D. 325); vacated, 53 I.D. 649.
- Rogers, Horace B. (10 L.D. 29); overruled, 14 L.D. 321.
- \*Rogers *v. Lukens* (6 L.D. 111); overruled, 8 L.D. 110 (See 9 L.D. 360).
- Romero *v. Widow of Knox* (48 L.D. 32); overruled so far as in conflict, 49 L.D. 244.
- Roth, Gottlieb (50 L.D. 196); modified, 50 L.D. 197.
- Rough Rider and Other Lode Claims (41 L.D. 242, 255); vacated, 42 L.D. 584.
- St. Clair, Frank (52 L.D. 597); modified, 53 I.D. 194.

- \*St. Paul, Minneapolis and Manitoba Ry. Co. (8 L.D. 255); modified, 13 L.D. 354 (See 32 L.D. 21).
- St. Paul, Minneapolis and Manitoba Ry. Co. v. Fogelberg (29 L.D. 291); vacated, 30 L.D. 191.
- St. Paul, Minneapolis and Manitoba Ry. Co. v. Hagen (20 L.D. 249); overruled, 25 L.D. 86.
- Salsberry, Carroll (17 L.D. 170); overruled, 39 L.D. 93.
- Sangre de Cristo and Maxwell Land Grants (46 L.D. 301); modified, 48 L.D. 88.
- Santa Fe Pacific R.R. Co. v. Peterson (39 L.D. 442); overruled, 41 L.D. 333.
- Satisfaction Extension Mill Site (14 L.D. 173) (See 32 L.D. 128).
- \*Sayles, Henry P. (2 L.D. 88); modified, 6 L.D. 797 (See 37 L.D. 330).
- Schweite, Helena M., 14 IBLA 305 (Feb. 1, 1974); Naughton, Harold J., 3 IBLA 237, 78 I.D. 300 (1971) is distinguished by Kristeen J. Burke, Joe N. Melovedoff, Victor Melovedoff, 20 IBLA 162 (May 5, 1975).
- Schweitzer v. Hilliard *et al.* (19 L.D. 294); overruled so far as in conflict, 26 L.D. 639.
- Serrano v. Southern Pacific R.R. Co. (6 C.L.O. 93); overruled, 1 L.D. 380.
- Serry, John J. (27 L.D. 330); overruled so far as in conflict, 59 I.D. 416, 422.
- Shale Oil Company (See 55 I.D. 287).
- Shanley v. Moran (1 L.D. 162); overruled, 15 L.D. 424.
- Shillander, H. E., A-30279 (January 26, 1965), overruled, 79 I.D. 416 (1972).
- Shineberger, Joseph (8 L.D. 231); overruled, 9 L.D. 202.
- Silver Queen Lode (16 L.D. 186); overruled, 57 I.D. 63.
- Simpson, Lawrence W. (35 L.D. 399, 609); modified, 36 L.D. 205.
- Sipchen v. Ross (1 L.D. 634); modified, 4 L.D. 152.
- Smead v. Southern Pacific R.R. Co. (21 L.D. 432); vacated, 29 L.D. 135.
- Snook, Noah A. *et al.* (41 L.D. 428); overruled so far as in conflict, 43 L.D. 364.
- Sorli v. Berg (40 L.D. 259); overruled, 42 L.D. 557.
- South Dakota Mining Co. v. McDonald, 30 L.D. 357 (1900), distinguished, 28 IBLA 187, 83 I.D. 609 (1976).
- Southern Pacific R.R. Co. (15 L.D. 460); reversed, 18 L.D. 275.
- Southern Pacific R.R. Co. (28 L.D. 281); recalled, 32 L.D. 51.
- Southern Pacific R.R. Co. (33 L.D. 89); recalled, 33 L.D. 528.
- Southern Pacific R.R. Co. v. Bruns (31 L.D. 272); vacated, 37 L.D. 243.
- South Star Lode (17 L.D. 280); overruled, 20 L.D. 204; 48 L.D. 523.
- Spaulding v. Northern Pacific R.R. Co. (21 L.D. 57); overruled, 31 L.D. 151.
- Spencer, James (6 L.D. 217); modified, 6 L.D. 772; 8 L.D. 467.
- Sprulli, Leila May (50 L.D. 549); overruled, 52 L.D. 339.
- Standard Oil Company of California *et al.*, 76 I.D. 271 (1969), no longer followed, 5 IBLA 26, 79 I.D. 23 (1972).
- Standard Oil Company of California v. Morton, 450 F. 2d 493 (9th Cir. 1971); 79 I.D. 23 (1972).
- Standard Shales Products Co. (52 L.D. 522); overruled so far as in conflict, 53 I.D. 42.
- Star Gold Mining Co. (47 L.D. 38); distinguished by U.S. v. Alaska Empire Gold Mining Co., 71 I.D. 273 (1964).
- State of California (14 L.D. 253); vacated, 23 L.D. 230.
- State of California (15 L.D. 10); overruled, 23 L.D. 423.
- State of California (19 L.D. 585); vacated, 28 L.D. 57.
- State of California (22 L.D. 428); overruled, 32 L.D. 34.
- State of California (32 L.D. 346); vacated, 50 L.D. 628 (See 37 L.D. 499 and 46 L.D. 396).
- State of California (44 L.D. 118); overruled, 48 L.D. 98.
- State of California (44 L.D. 468); overruled, 48 L.D. 98.
- State of California v. Moccettini (19 L.D. 359); overruled, 31 L.D. 335.
- State of California v. Pierce (3 C.L.O. 118); modified, 2 L.D. 854.
- State of California v. Smith (5 L.D. 543); overruled so far as in conflict, 18 L.D. 343.

- State of Colorado (7 L.D. 490); overruled, 9 L.D. 408.
- State of Florida (17 L.D. 355); reversed, 19 L.D. 76.
- State of Florida (47 L.D. 92, 93); overruled so far as in conflict, 51 L.D. 291.
- State of Louisiana (8 L.D. 126); modified, 9 L.D. 157.
- State of Louisiana (24 L.D. 231); vacated, 26 L.D. 5.
- State of Louisiana (47 L.D. 366); overruled so far as in conflict, 51 L.D. 291.
- State of Louisiana (48 L.D. 201); overruled so far as in conflict, 51 L.D. 291.
- State of Nebraska (18 L.D. 124); overruled, 28 L.D. 358.
- State of Nebraska *v. Dorrington* (2 C.L.L. 467); overruled so far as in conflict, 26 L.D. 123.
- State of New Mexico (46 L.D. 217); overruled, 48 L.D. 98.
- State of New Mexico (49 L.D. 314); overruled, 54 L.D. 159.
- State of Utah (45 L.D. 551); overruled, 48 L.D. 98.
- \**Stevenson, Heirs of v. Cunningham* (32 L.D. 650); overruled so far as in conflict, 41 L.D. 119 (See 43 L.D. 196).
- Stewart et al. v. Rees et al.* (21 L.D. 446); overruled so far as in conflict, 29 L.D. 401.
- Stirling, Lillie E.* (39 L.D. 346); overruled, 46 L.D. 110.
- Stockley, Thomas J.* (44 L.D. 178, 180); vacated, 260 U.S. 532 (See 49 L.D. 460, 461, 492).
- Strain, A. G.* (40 L.D. 108); overruled so far as in conflict, 51 L.D. 51.
- Streit, Arnold* (T-476 (Ir.)), Aug. 26, 1962, unreported; overruled, 62 L.D. 12.
- Stricker, Lizzie* (15 L.D. 74); overruled so far as in conflict, 18 L.D. 283.
- Stump, Alfred M. et al.* (39 L.D. 437); vacated, 42 L.D. 566.
- Sumner v. Roberts* (23 L.D. 201); overruled so far as in conflict, 41 L.D. 173.
- Superior Oil Company, A-28897* (September 12, 1962) and *William Wostenberg, A-26450* (September 5, 1952), distinguished in dictum; 6 IBLA 318, 79 L.D. 439 (1972).
- Sweeney v. Northern Pacific R.R. Co.* (20 L.D. 394); overruled, 28 L.D. 174.
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NOTE.—The abbreviations used in this title refer to the following publications: "B.L.P." to Brainard's Legal Precedents in Land and Mining Cases, vols. 1 and 2; "C.L.L." to Copp's Public Land Laws edition of 1875, 1 volume; edition of 1882, 2 volumes; edition of 1890, 2 volumes; "C.L.O." to Copp's Land Owner, vols. 1-18; "L. and R." to records of the former Division of Lands and Railroads; "L.D." to the Land Decisions of the Department of the Interior, vols. 1-52; "I.D." to Decisions of the Department of the Interior, beginning with vol. 53.—EDITOR.

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# DECISIONS OF THE DEPARTMENT OF THE INTERIOR

SOUTHERN PACIFIC TRANSPORTATION CO., JAY R. FOGAL,  
LLOYD D. HAYES, INTERVENOR

23 IBLA 232

Decided *January 9, 1976*

Appeal from the rejection of an application for patent to public land pursuant to the Transportation Act of 1940.

Reversed and remanded.

## 1. Railroad Grant Lands

Legal title, although not record title, to granted lands passes to a railroad under a railroad land grant act upon the filing of a map of definite location of the railroad and such title is subject to divestiture by adverse possession under state laws prior to the issuance of patent to the granted lands.

## 2. Railroad Grant Lands

Where land within the primary limits of a railroad land grant is excluded or reserved by the terms of the granting act, the adverse possession of one who asserts only that he has satisfied the statute of limitations of a particular State will not divest the United States of its title or invest the adverse possessor with any interest in the land.

## 3. Railroad Grant Lands

Where land within the primary limits of a railroad land grant is not excluded or

reserved by the terms of the granting act, the statute operates to vest title in the railroad at the time the railroad qualifies to receive it. It is a grant *in praesenti*, regardless of whether the United States has issued its patent or certificate.

## 4. Mineral Lands: Generally—Railroad Grant Lands

Lands known to be mineral in character (except for coal or iron) at the time of definite location of a railroad are excluded from the grant of place lands to the railroad even though the lands may later lose their mineral character.

## 5. Mineral Lands: Determination of Character of—Railroad Grant Lands

The period for determination by the Department of the Interior whether public land included within the primary limits of a legislative grant-in-aid of the construction of a railroad which excepts mineral land is mineral in character extends to the time of issuance of patent to the railroad company.

## 6. Act of Sept. 18, 1940 (Transportation Act of 1940, 49 U.S.C. § 65(b) (1970))—Conveyances: Generally—Railroad Grant Lands—Words and Phrases

Where the purchaser from the railroad of unpatented land believed at the time of his purchase that the land was min-

eral, and there was physical evidence of its mineral character, or if conditions were such that the purchaser should have known then that the land was excepted from the grant to the railroad, he was not a purchaser in good faith within the "innocent purchaser" proviso of section 321 (b) of the Transportation Act of 1940.

#### 7. Mineral Lands: Determination of Character of—Railroad Grant Lands—Rules of Practice: Hearings

When the Department of the Interior finds that public land within the place limits of a legislative grant-in-aid of the construction of a railroad was mineral in character and the railroad company challenges such finding a hearing should be granted at which the Department has the obligation of making a prima facie case of mineral character, whereupon the company has the burden of establishing nonmineral character by a preponderance of the evidence.

#### 8. Trespass: Generally

Where timber on Federal land is cut for commercial purposes by one who knows that no patent has issued and who occupies the land either as a mining claimant or as one who is engaged in attempting to defeat the interests of third parties by adverse possession, the taking of the timber constitutes a willful trespass against the interests of the United States. If the taking occurs after a State court has issued its decree quieting title in the timber-taker against all third parties but not against the United States, the taking will nonetheless constitute a trespass if it is determined that legal title had not passed from the United States by operation of law.

**APPEARANCES:** James M. Day, Jr., Esq., Sacramento, California, for the appellant; Donald H. Coulter, Esq.,

Grants Pass, Oregon, for the intervenor.

#### OPINION BY ADMINISTRATIVE JUDGE STUEBING

#### INTERIOR BOARD OF LAND APPEALS

The Southern Pacific Transportation Company, successor to the Central Pacific Railroad Company of California, applied by its Selection List No. 35 for a patent to 140 acres of land in the NE $\frac{1}{4}$  of section 15, T. 12 N., R. 10 E., M.D.M., for the benefit of Jay R. Fogal. The application was filed pursuant to section 321(b) of the Transportation Act of Sept. 18, 1940, 49 U.S.C. § 65(b) (1970).

The land at issue allegedly was subject to the operation of the Federal grant of lands made available to the Central Pacific by the Act of July 1, 1862 (12 Stat. 489, *as amended*, by the Act of July 2, 1864 (13 Stat. 356)). The Central Pacific quitclaimed this and other land on Apr. 24, 1890, to Joseph R. Walker and Matthew H. Walker in consideration of their payment of \$725, thereby initiating a chain of title which, through mesne conveyances, ultimately terminated with Alpine Gold Mining Company, the last grantee of record.

In order to receive the advantageous freight rates afforded by the Transportation Act of 1940, the Act required the land grant railroads to release all unsatisfied claims to grant lands, except, *inter alia*, claims to lands previously sold by

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such railroads to an innocent purchaser for value. Accordingly, when the railroad filed its release, it did not release its claim to the land here at issue.

Over a period of many years from 1902 to the 1930's numerous mining claims were located on the land by persons who were strangers to the chain of title created by the sale from Central Pacific to the Walkers. These claims eventually blanketed the subject land.

To compound the problem, there is yet another chain of title which originated in 1892 with a deed from one Pablo Cortez in favor of Robert Hunt. There is no legitimate basis shown for this chain of title, which is comprised of 10 conveyances, and apparently terminated with the last transfer of record in 1929.

In 1934 Jay R. Fogal, a stranger to both the chain of title from Central Pacific and the chain of title from Cortez, acquired the several unpatented mining claims which blanketed the land. In 1947 he applied for patent to these claims under the 1872 mining law. The claims were examined on several occasions by two mineral examiners of the Bureau of Land Management who each recommended that contest proceedings be initiated to test the validity of each of the claims. Contest proceedings were brought and, after a hearing, the Hearing Examiner held that all of the claims were null and void because no qualifying discovery of a valuable min-

eral deposit had been made within the boundaries of any of the eight claims held by Fogal. Fogal appealed to the Director, Bureau of Land Management, who affirmed the Hearing Examiner's decision on June 16, 1959. A final appeal by Fogal to the Secretary resulted in another affirmation of the holding that the claims are null and void because of lack of discovery of a valuable mineral deposit within the boundaries of any of the claims sufficient to warrant a prudent man in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine. *United States v. Jay R. Fogal*, A-28233 (May 10, 1960). Fogal did not seek judicial review of this decision, which constituted a final determination.

Apparently, however, Fogal remained in possession of the land, made certain improvements thereon, and sold commercial timber therefrom. In 1972 he brought suit in Superior Court of the State of California in and for the County of El Dorado, to quiet title to the property, claiming ownership through adverse possession in compliance with the California statute of limitations. The Court's judgment in that action held that Fogal was "the owner in fee simple and entitled to the possession of" the described land, and held further that the named defendants in that action, and those claiming title under them, "are without any right, title, interest, claim or estate whatsoever \* \* \*."

Nonetheless, the Court said, "This judgment does not foreclose any claim of the United States of America in and to said real property." *Fogal v. Mont Eaton, et al.*, No. 20264 (Entered July 13, 1972). The judgment was dated July 7, 1972.

Armed with his quiet title decree, Fogal then approached Southern Pacific Transportation Company and prevailed upon it to file this application for patent on Fogal's behalf.

Meanwhile, Lloyd D. Hayes, Intervenor herein, had allegedly been negotiating with the Alpine Gold Mining Company, the last owner of record in the chain of title emanating from the Central Pacific Railroad Co.; and, according to Hayes, the Alpine Gold Mining Company conveyed the land to Hayes by quitclaim deed dated July 12, 1972. We note that Alpine Gold Mining Company was a party named in the quiet title action brought by Fogal, and that the judgment specifically held that Alpine Gold Mining Company held no interest in the land. We note further that the quitclaim from Alpine Gold Mining Company to Hayes was dated 5 days *after* the judgment was dated, and 1 day *before* the judgment was filed and entered. We have no means of knowing whether the land was then listed in the notices of *lis pendens*, nor have we analyzed the effect of these considerations on the respective positions of the parties under California law. Accordingly, we make no

adjudication of the protest and claim of Lloyd D. Hayes.

On Feb. 24, 1975, the California State Office of the Bureau of Land Management held for rejection the application of Southern Pacific for the reason that Fogal was not in the chain of title emanating from the Central Pacific Railroad Company, there having been no conveyance from Alpine Gold Mining Company to Fogal. The decision further held that Fogal's title by adverse possession is a new title, not based upon the chain of title from the railroad, and that a title acquired by adverse possession does not qualify the holder as an innocent purchaser for value, as contemplated by the Transportation Act of 1940.

[1] Appellants argue that the decision is in error; that an adverse possessor can, in law, acquire the interest or estate of a railroad (or of its grantees) under a land grant in aid of construction, while the United States continues to hold legal title.

We are in partial agreement with the appellants. This Department has previously examined the status of an adverse possessor who had matured a limitation title to railroad grant lands by compliance with the adverse possession statutes of the State in which such lands are situated. In *Lester J. Hamel*, 74 I.D. 125, 129 (1967), it was noted that the Supreme Court has held in several instances that title may be acquired by adverse possession to lands granted to railroads in aid of construction of their lines, citing *Toltec Ranch*

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*Company v. Cook*, 191 U.S. 532 (1903); *Iowa Railroad Land Co. v. Blumer*, 206 U.S. 482 (1907); *Missouri Valley Land Co. v. Wiese*, 208 U.S. 234 (1908). While none of the cited Supreme Court cases involve circumstances which correspond in all aspects with the circumstances of this case, they are nonetheless persuasive that a title acquired by adverse possession of railroad grant lands, applicable state statute, would qualify the holder of such title just as effectively as though he had acquired it through a lawful conveyance. \* \* \* "Hence, the statute of limitations would run against the railroad [and the railroad's grantees] by one in adverse possession of the railroad's land." \* \* \* *Lester J. Hamel, supra*, at 130.

The decision appealed from notes that, "Title by adverse possession is a new title not based upon the chain of title from the railroad." Appellants rebut this objection effectively, we think, by the following quotation from *Williams v. Sutton*, 43 Cal. 65, 73 (1872):

[The new title thus acquired is] founded on and springs from the disseizen . . . The new title thus acquired by the disseizor must of necessity correspond with that [title] on which the disseizin operated, as he could not acquire by disseizin a greater estate than that held by the disseizee.

This illustrates that although the source of the title is "new," it is nevertheless the same title.

We might add that not only can the adverse possessor acquire no greater title than that held by the

disseizee, he can acquire no different title. In *Toltec Ranch Co. v. Cook, supra*, at 538, the Supreme Court said:

Adverse possession, therefore, may be said to transfer the title as effectually as a conveyance from the owner; it may be considered as tantamount to a conveyance. And the Central Pacific Railroad Company had the title. *Salt Co. v. Tarpey*, 142 U.S. 241 [1891]. It would seem, therefore, an irresistible conclusion that it could have been transferred by any of the means which the law provided. \* \* \*

Thus, if the Central Pacific Railroad Co. of California and the others in the record chain of title emanating from the Central Pacific's conveyance were entitled to the land, then Fogal succeeded to their entitlement, and *only* to their entitlement.

[2] This raises a critical issue not addressed in the decision below, to wit: Was the Central Pacific Railroad Company (or its grantees) entitled to the land? If not, Fogal has no right, title, claim or interest whatever in the land. It has been firmly established that the United States may not be divested of its title to federal lands by one who asserts only that he has satisfied the statute of limitations of a particular State. Mere occupancy of public lands and making improvements thereon give no vested right therein against the United States or any [subsequent] purchaser therefrom, *Sparks v. Pierce*, 115 U.S. 408, 413 (1885), and an occupant must show that he occupies the same under

some proceeding or law that at least gives him the right of possession. *Henshaw v. Ellmaker*, 56 I.D. 241, 244 (1937); *Keller v. Bullington*, 11 L.D. 140 (1890). Moreover, as we have seen, the decree of the California Superior Court quieting title in Fogal expressly provided that it did not affect the interest of the United States, nor could it have done so, the United States not having been a party to the action.

[3] It has been held that legal title,<sup>1</sup> although not record title, to granted lands passes to a railroad under a railroad land grant act upon the filing by the railroad of a map of definite location of its line, and that the statute operates as a grant *in praesenti* at the time the railroad qualifies to receive it, regardless of whether a patent or certificate is issued by the United States. *Missouri Valley Land Co. v. Wiese, supra*; *Iowa Railroad Land Co. v. Blumer*; *Lester J. Hamel, supra*.

Accordingly, if the Central Pacific Railroad qualified to receive this tract, the legal title vested in the railroad and eventually lodged with Fogal, where it presently resides, and the United States' only interest is to fulfill its ministerial obligation to issue the patent. *Wisconsin Central Railroad Co. v. Price County*, 133 U.S. 496 (1890);

*Deseret Salt Co. v. Tarpey*, 142 U.S. 241 (1891); *Toltec Ranch Co. v. Cook, supra*.

However, the granting act and the amendment thereto specifically except *inter alia* "mineral land"<sup>2</sup> (other than coal and iron land) or "any lands returned or denominated as mineral lands" from the terms of the grant, and therein lies the core of our concern with this case.

The record before us is replete with references to the history and occupation of this tract as mineral land. The Supreme Court has often held that title did not pass by the railroad granting act to mineral lands which were reserved by the act. *McLaughlin v. United States*, 107 U.S. 526 (1882); *Western Pacific R.R. Co. v. United States*, 108 U.S. 510 (1882); *Barden v. Northern Pacific R.R. Co.*, 154 U.S. 288 (1894); *United States v. Southern Pacific Co.*, 251 U.S. 1 (1919); *State of Wyoming v. United States*, 255 U.S. 489 (1921). (Other Supreme Court citations omitted).

In order to make a finding that title to the land specified by the granting acts did not pass to the grantee of the railroad company, it must appear that the lands were of known mineral character either at the date of definite location of the line or at the date of the original sale by the railroad, or at any time

<sup>1</sup> Ordinarily, we would consider that such a grant conveyed the equitable title, while the United States retained the bare legal or "record" title. However, both the United States Supreme Court and this Department have held that it was "the legal title as distinguished from an equitable or inchoate interest" which passed to the railroads. *Deseret Salt Co. v. Tarpey*, 142 U.S. 241 (1891); *Lester J. Hamel*, 74 I.D. 125 (1967).

<sup>2</sup> Also excluded from the grant were pre-emption, homesteads, swamplands, or other lawful claims, any Government reservation, or the improvements of any bona fide settler. Sec. 4 of the Act of July 2, 1864. If the official records of the land office show that the subject land was in any of these categories, this claim could be disallowed without a hearing.

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between, and that the purchasers should have known at the time of their purchase that the land was excepted from the grant to the railroad, and that they could obtain no title from the railroad. This is so even though the land later loses its mineral character. *Southern Pacific Company*, 71 I.D. 224 (1964); *Southern Pacific Co. (Heirs of George H. Wedekind)*, 20 IBLA 365 (1975). As indicated above, the record before us contains much which suggests that this may have been the situation in this instance. A resume of some of this evidence follows.

The land is situated in El Dorado County, California, in the Georgetown Mining District in the foothills of the Sierra Nevada Mountains, in what is generally considered part of the Mother Lode Belt. Empire Creek flows through the property, which has a number of springs on it which feed the creek. The Mother Lode formation, also known as the Sierra Gold Belt, is described as one of the most interesting and, so far, the most persistent in depth of all the gold bearing formations in the United States. There are, or have been, many producing gold mines in the area. The foregoing information is contained in reports of mineral examinations conducted in Sept. 1949, Oct. 1956 and Apr. 1957. The reports further show considerable evidence of mining activity over a long term of time. Indeed, in the 1949 report the examiner states:

These claims are located near a split in the Mother Lode Belt and cover a portion of the Mariposa and associated formations. Parts of the claims *were worked* by ground sluicing and hydraulic methods *in the early days of mining in California* as is evidenced by old glory holes, cuts and other work. (Italics added.)

We turn now to the decision of Hearing Examiner John A. Wood, dated Apr. 28, 1958, rendered in *United States v. Fogal*, Contest No. 5078, the proceeding to determine the validity of the mining claims held by Fogal which blanketed the subject land. The decision is not a part of the record of this case, but we take official notice thereof pursuant to 43 CFR 4.24(4)(b). In this decision the Hearing Examiner recounts the evidence adduced at the hearing. The Government's expert, a mining engineer, testified to the large number and variety of mine workings he found. He said there "were a large number of rock exposures all over the claims which have been caused by minor surface workings." In addition he described three separate areas where old evidence of ground sluicing operations was found, six adits, one winze at the end of a 75-foot adit, several small earth reservoirs and/or diversion ponds, dams and ditches, several pits, shafts, trenches and cuts, and glory holes, most of which appeared old, some of which were caved or filled, and some of which were covered by vegetation, including small trees. His samples indicated little or no gold.

Fogal testified that he had found and produced sufficient gold to war-

rant his desire and intention to develop mining operations, and that he had only discontinued such operations because of the high cost and difficulty in getting labor. He exhibited gold which he took from the land. Fogal insisted that the land is mineral in character and testified to the geology in support of that assertion, referring to Bulletin 108, California Bureau of Mines. Quoting from the decision, at page 11:

Mr. Fogal testified at length as to what the records show on the operation of various mines when gold was \$20 an ounce and labor was \$2 a day and covered mines in various states and locations in an effort to show what might be on these claims in question and could be recovered if a fair price of gold was established suitable to warrant capital in assisting him in the exploration and development of the property.

Fogal also submitted proposed findings of fact, which included the following:

Contestee purchased said claims from partners of dissolved Madrone Mining Company, who purchased claims from H. L. Herzinger July 12th 1929. And mined said claims until sold to contestee.

It is important to note that although the contest complaint charged both that the land was non-mineral in character and that no discovery of valuable mineral deposits had been made within the boundaries of the claims, the contest was decided solely on a finding that there was, at that time, no discovery and, accordingly, there was no adjudication of the issue of the mineral character of the land. Moreover, a finding or recommendation that

the land was nonmineral in the 1950's would not be dispositive of the question of its mineral character in the 1880's, which is the focus of our concern now.

In reviewing the Hearing Examiner's decision on appeal, the Acting Director, Bureau of Land Management, noted that Fogal "offered testimony to the effect that the subject claims were previously successfully operated for the gold therein contained and that it is only because of the increase in price of labor and the depressed price of gold that they cannot now be successfully exploited."

We now refer to the two title reports in the record. Both were prepared by the Inter-County Title Company for Fogal and Hayes, respectively, and were submitted in support of their separate claims. These reports show not only that there has been historical interest in this land by a number of gold mining companies, but they also reflect doubt on the bona fides of the original purchasers from the railroad.

It will be recalled that the Central Pacific conveyed this land in 1890 to Joseph R. Walker and M. H. Walker. There is no record of a subsequent conveyance by either of them. However, they apparently conveyed certain interests in this land to two gold mining companies which were both under the exclusive directorship of members of the Walker family (with the possible exception of E. O. Howard). These were the Utah and California Gold Mining Company (on whose board

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of directors Howard served with four Walkers), and the Union Consolidated Gold Mining Company.

The second conveyance of record (in 1929) was by the directors and trustees of these two Utah corporations, which by then were defunct, and by the heirs of Joseph R. Walker and M. H. Walker. They conveyed this land to E. O. Howard, an erstwhile director of the Utah and California Gold Mining Company. Less than 4 months later Howard, joined by his wife, conveyed to the Alpine Gold Mining Company, also a Utah corporation. The title report reveals that in 1936 the vice president of Alpine Gold Mining Company was one John H. Walker, and its secretary was J. R. Walker.

The reports also show that there were two Joseph R. Walkers. Both sometimes used the initials J. R. and they were, respectively, Joseph R. Walker, Sr. and Joseph R. Walker, Jr., and both apparently signed occasionally without using their generational designation. Consequently, it is impossible to say with certainty that the Joseph R. Walker who purchased the land was the same as the Joseph R. Walker who served as a director or an officer of the different gold mining companies which held this land. However, it is fairly apparent that the Walker family exercised significant control over three separate gold mining companies, to which it committed the land, so that from the time the land was purchased by the Walkers in 1890 until the time Fogal

obtained his quiet title decree, a period of 82 years, the land was in the hands of the Walkers or one of the three gold mining companies controlled by that family. This suggests rather strongly that the Walkers acquired the land in the first place because they regarded it as mineral in character, and treated it as such thereafter.

Moreover, it seems that the Walkers were not alone in their apparent belief that this was mineral land with a valuable gold potential. Strangers to the Central Pacific-Walker title began locating mining claims on this land near the turn of the century. Some of these were acquired by the Madrone Mining Company, which eventually conveyed them to Fogal. Apparently other mining claims, or interests therein, were not acquired by Fogal, and remained outstanding until the quiet title action eliminated the other claimants.

It appears, therefore, that virtually all interest in this property, from the Walkers' to Fogal's, and numerous others', has focused exclusively on the mineral character of the land, save only for Fogal's harvest of commercial timber, concerning which we will say more, *infra*.

[5] It is well established law that the determination of the date the mineral character of the land in the primary limits of a railroad land grant was known (to ascertain whether the land passed under the grant) can be made at any time prior to the issuance of a patent to

the railroad. If it is found that the land was known to be mineral in character at the time of the railroad's conveyance, and the purchaser was chargeable with actual or constructive knowledge of that fact, the grant would fail as to that land. *Southern Pacific Co. (Wedekind)*, *Southern Pacific Company*, *supra*; *State of Wyoming v. United States*, *supra* at 507; *Anderson v. McKay*, 211 F. 2d 798, 807 (D.C. Cir. 1954), *cert. denied*, 348 U.S. 836 (1954), *rehearing denied*, 348 U.S. 890 (1954); *Barden v. Northern Pacific R.R. Co.*, *supra*. In determining whether the land is mineral in character, it is not essential that there be an actual discovery of mineral on the land. It is sufficient to show only that known conditions were such as reasonably to engender the belief that the land contained mineral of such quality and in such quantity as to render its extraction profitable and justify expenditures to that end. Such belief may be predicated upon geological conditions, discoveries of minerals in adjacent land and other observable external conditions upon which prudent and experienced men are shown to be accustomed to act. *United States v. Tobiassen*, 10 IBLA 379 (1973).

[6] Where the purchaser from the railroad believed at the time of purchase that the land was mineral and there was physical evidence of its mineral character, or if conditions were such that the purchaser should have known then that the

land was excepted from the grant to the railroad company, he was not a purchaser in good faith within the "innocent purchaser" proviso of section 321(b) of the Transportation Act of 1940. *United States v. Tobiassen*, *supra*; *Southern Pacific Company*, *supra*; *Southern Pacific Co. (Wedekind)*, *supra*, and cases therein cited.

[7] Where it is found that railroad grant lands did not pass because of their mineral character and the railroad disputes this finding, the procedure is for the Department to bring charges against the railroad, and to hold a hearing on the charges. At any such hearing it is first the Department's obligation to present a *prima facie* case that the lands were mineral in character on the critical date, whereupon the burden shifts to the railroad to show by a preponderance of the evidence that the lands, or any part thereof, were not mineral in character. *United States v. Tobiassen*, *supra*; *Southern Pacific Company*, *supra*; *Southern Pacific Co. (Wedekind)*, *supra*, and cases cited therein.

We note that when this application was filed, the California State Office, BLM, requested a report from the Geological Survey as to whether this land was mineral in character on or before April 24, 1890, the date of the railroad's conveyance to the Walkers. The Geological Survey replied that the land was without value for any of the minerals covered by the mineral leasing laws, but added:

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Gold has been reported in the area. A field examination is recommended. Your attention is directed to: California Journal of Mines and Geology, v. 52, no. 4, p. 492, p. 10.

This advice was not acted upon by Bureau personnel. Instead, the decision from which this appeal is taken was issued on the erroneous premise that one who acquires title by adverse possession cannot qualify.

That decision must be vacated and the case remanded for a thorough investigation of the mineral status of the land on the critical date and/or the good faith of the purchasers from the railroad.<sup>3</sup> Should this investigation reveal insufficient cause to believe that the land was excluded from the operation of the grant, a patent must issue. If, however, the investigation discloses sufficient evidence to indicate prima facie that the land was excluded from the grant and the railroad company dis-

putes this finding, a hearing must be conducted upon proper charges and a decision rendered.

Finally, we note that in his "Affidavit of Use and Occupancy" appended to the application Fogal states, "Timber has been removed from said property for commercial purposes." The timber in question apparently is that which is described as follows in the 1957 report of investigation:

The soil covering is heavy and supports an *excellent* stand of timber consisting of Ponderosa pine, cedar, Douglas fir and Sugar pine. Madrone trees, from which the claim group gets its name grow to an exceptional size of 18 inches in diameter. A considerable number of Ponderosa pines were noted to 36 to 40 inches in diameter. Stumpage on these eight claims was estimated to be worth approximately \$30,000. (*Italics in original.*)

We question Fogal's right to take this timber. He certainly had no right to remove it for commercial purposes as the holder of unpatented mining claims. *Teller v. United States*, 113 F. 273 (8th Cir. 1901). Nor could he have legally harvested it during his subsequent period of adverse possession since he was fully aware of the Federal interest, having just been through a Government contest proceeding concerning this same land. Moreover, his adverse possession did not, and could not, operate against the interests of the United States. *Sparks v. Pierce, supra*. Therefore, any commercial timber-cutting by Fogal between the years 1934, when he ac-

<sup>3</sup> The dissenting opinion concerns itself with the fact that Fogal, being an adverse possessor, is not "an innocent purchaser for value within the meaning of the 1940 Act." We agree that he is not, but we consider it irrelevant. The very language of the Act imposes an administrative duty upon the Secretary of the Interior to find whether the land in question was " \* \* \* heretofore sold by any such carrier to an innocent purchaser for value \* \* \*." Thus, the determination of bona fides and the payment of value is focused by the statute upon the person(s) to whom the carrier sold, and not on subsequent claimants to the title who might have acquired their interest through inheritance, gift, "or any of the means which the law provided." See *Toltec Ranch Co. v. Cook, supra*. Accordingly, the statutory test must be applied to the Walkers, as the purchasers from the railroad, and not to Fogal.

quired the mining claims and 1972, when title was quieted in him by judicial decree was, *a fortiori*, a willful trespass. After having obtained his quiet title decrees, he might reasonably have supposed that he had a right to harvest the timber notwithstanding the Court's caveat that the decree did not reach the interests of the United States. This would be so because, if all else were regular, title would have passed out of the United States, which would hold only the record title. *Lester J. Hamel, supra*. Even so, if the land is found not to have passed under the railroad land grant, Fogal would be liable for removal of the timber. However, it seems unlikely that the timber removal occurred during this period, as Fogal's affidavit concerning it was made only 3 months after the Court issued its decree. An investigation of the circumstances of the timber removal should be correlated with the investigation of the mineral character of the land. If the cutting of timber is likely to continue it may be necessary to seek a temporary injunction pending resolution of the title question. *See United States v. Foresyth*, 321 F. Supp. 761 (D. Colo. 1971).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case is remanded to the California State Office, Bureau of Land

Management, for further action consistent with this decision.

EDWARD W. STUEBING,  
*Administrative Judge.*

I CONCUR:

FREDERICK FISHMAN,  
*Administrative Judge.*

#### ADMINISTRATIVE JUDGE THOMPSON DISSENTING:

I would affirm the decision of the Bureau of Land Management's California State Office. I see no basis for a hearing in this case because the application was filed on behalf of Jay R. Fogal who has no standing to claim that he is either the purchaser from the railroad company or in a chain of title in privity with the purchaser.

The majority decision in this case assumes, as absolute propositions, matters which are the very issues to be resolved. For example, the decision states positively that when the railroad company filed its release under sec. 321(b) of the Transportation Act of 1940, 49 U.S.C. § 65 (b) (1970), it did not release its claim to the land here at issue. The effect of the railroad's release and the interpretation of the Transportation Act are the determinative and vital questions to be resolved here.

Unfortunately the majority's opinion rests primarily upon Supreme Court cases rendered long before the Transportation Act of 1940.

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Those decisions decided questions of title to land after patents had been issued and resolved disputes between private parties based upon the application of state law—not federal law.

Whether a patent should issue to the railroad company here for the benefit of Fogal, claiming title only as an adverse possessor of the company and its successors in interest, is a question of federal law—not state law—as it necessarily involves the effect of the Transportation Act and the release filed under it. *Of. United States v. Powell*, 330 U.S. 238 (1947); *Krug v. Santa Fe Pac. R. Co.*, 329 U.S. 591 (1947).

This case is a case of first impression. Although there have been some Departmental decisions which relate to some of the problems which arise in this case, none squarely faced the crucial issues here. Since we have before us for the first time an issue which decides an important effect of the Transportation Act, we should very carefully consider that Act in connection with the railroad grant statutes and the changes in the law and public policy since the date of that Act.

As is well known in the history of public lands, railroad companies were granted certain lands along their rights-of-way as a subsidy to help the development of the railway system throughout this country. *Krug v. Santa Fe Pac. R. Co.*, *supra*. The Act of July 1, 1862, 12 Stat. 489, as amended by the Act of

July 2, 1864, 13 Stat. 356, was one of the major railroad grant statutes. In return for the benefits granted by the United States, the federal government received rate concessions. Among other provisions to help an ailing railroad industry, the Transportation Act of 1940 did away with certain favorable government rate privileges. (49 U.S.C. § 65(a) (1970)), conditioned upon the railroad carrier filing

\* \* \* a release of any claim it may have against the United States to lands, interests in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest under any grant to such carrier or such predecessor in interest as aforesaid. \* \* \*

49 U.S.C. § 65(b) (1970).

However, sec. 321(b) of the Act further stated:

\* \* \* Nothing in this section shall be construed as requiring any such carrier to reconvey to the United States lands which have been heretofore patented or certified to it, or to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier to an innocent purchaser for value or as preventing the issuance of patents to lands listed or selected by such carrier, which listing or selection has heretofore been fully and finally approved by the Secretary of the Interior to the extent that the issuance of such patents may be authorized by law. [Italics added.]

*Id.*

It is apparent in this case that the railroad company filed the release required by the Act. By the terms of the Act such release included interests in lands "which have been granted" to the railroad. We must, therefore, start with the first premise that lands which had been granted to the railroad company were released to the United States, instead of assuming they were not released. The provision of sec. 321(b) of the Act last quoted above operates as a limitation upon the effect of the releases filed by the railroad companies. First, it makes it clear that the railroad carriers were not required to reconvey to the United States lands which had been patented or certified to the company. The lands in question here have not been patented or certified. Next, it provides that the Act shall not prevent the issuance of patents confirming title to lands the Secretary finds has been heretofore sold "to an innocent purchaser for value." The next provision is inapplicable here, so we are confined to determining whether the conditions of the prior exception are satisfied.

When we analyze this exception it is obvious that the Transportation Act did not except all lands conveyed by a railroad company from the effect of its release. It made three requirements: (1) the land had to have been sold prior to the Act; (2) the purchaser had to be innocent, *i.e.*, a good faith standard; and (3) there had to be value for the purchase. Even if title had passed to the carrier, but patent had

not issued and the list not approved or certified for patent, the release would still effectually prevent this Department from issuing a patent to the railroad company if those three requirements were not satisfied. For example, this Department has no authority to issue a patent if land had been gratuitously conveyed by the railroad without a transfer of value, or if the purchaser fails to meet the good faith standard suggested by the qualifier "innocent." Congress apparently believed that where value had been paid for the land in good faith, the delay by the purchaser and his successors in interest in obtaining a certificate or patent should not prevent the purchaser from getting complete title, assuming that title did pass to the railroad company under the grant.

The Supreme Court has strictly interpreted the effect of the releases and sec. 321(b) of the Transportation Act. As stated in *Krug v. Santa Fe Pac. R. Co.*, *supra* at 597, in referring to the language in the Act regarding the releases:

\* \* \* This language in itself indicates a purpose of its draftsmen to utilize every term which could possibly be conceived to give the required release a scope so broad that it would put an end to future controversies, administrative difficulties, and claims growing out of land grants.  
\* \* \*

Further, the Court stated:

\* \* \* we think Congress intended to bar any future claims by all accepting railroads which arose out of any or all of the land-grant acts, insofar as those claims arose from originally granted, indemnity or lieu lands. All the Acts here

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involved, the Acts of 1866, 1874, 1904 and 1940, relate to a continuous stream of interrelated transactions and controversies, all basically stemming from one thing—the land grants. We think Congress wrote *finis* to all these claims for all railroads which accepted the Act by executing releases.

*Id.* at 598.

In determining the effect of the Act and the release by the railroad, we should, likewise, strictly interpret the Act and not broaden the scope of the exceptions to the releases beyond what Congress clearly intended. Instead of writing “*finis*” to the claim of the railroad in circumstances existing in this case, the majority has opened the door which may make available patents for the benefit of a class of persons not mentioned by Congress, and not within the policy for making the exception. The exception in sec. 321(b) of the Transportation Act protecting innocent purchasers for value is essentially a provision for equitable relief. It is predicated on there being equities in an innocent purchaser for value to be protected and warranting a confirmation of title. It is also a recognition of problems that might arise between the railroad company and its purchasers if the release were deemed to defeat their interests in the land, and the purchasers were to sue the railroad to recover the value paid to it. However, none of these considerations is involved here where the adverse possessor is claiming the railroad’s title to the land, not by virtue of pur-

chase but by virtue of an adverse holding of the land under a state statute of limitations.

Because the majority opinion rests so much on the “rights” of adverse possessors, let us consider them in relation to our situation. The majority tends to deprecate the conclusion in the BLM decision that the title of an adverse possessor is a new title not derived from the railroad. Nevertheless, the general majority rule throughout this country is that the title obtained by an adverse possessor under a state statute of limitations and quiet title action in state courts is a break in the chain of title and is a new title. 4 TIFFANY, REAL PROPERTY, § 1172, p. 892 (3d ed. 1975); 5 THOMPSON ON REAL PROPERTY, § 2541, p. 510 (1957 ed.). Appellant even admits that a title based on adverse possession establishes a new chain of title. His quotation from a California Supreme Court case has been adopted by the majority. However, a complete quotation is more enlightening. With reference to a right resting upon the statute of limitations, the California court in *Williams v. Sutton*, 43 Cal. 65 (1872), stated:

\* \* \* The rule itself is founded on the proposition that when the statute has fully run, and has become effectual to bar an adverse title, the disseizor acquires a new title founded on disseizin. He does not acquire or succeed to the title and estate of the disseizee, but is vested with a new title and estate, founded on and springing from the disseizin; and the title of the disseizee, if not wholly extin-

guished, has at least become inoperative in law, and is without a remedy to enforce it. (*Arrington v. Liscom*, 34 Cal. 381, and authorities there cited.) The new title thus acquired by the disseizor must of necessity correspond with that on which the disseizin operated, as he could not acquire by disseizin a greater estate than that held by the disseizee.

*Id.* at 73.

Obviously an adverse possessor claiming title under a state statute of limitations is out of the chain of title from the railroad and its purchasers. His title is one created by state law—not by private grant. He has no contractual relationship with the railroad company nor its successors. Unlike a purchaser and those in privity in the chain of title from the railroad, an adverse possessor would have no cause of action against the company for executing the release. Furthermore, there can be no good faith or equitable considerations stemming from the purchase from the railroad since the actions of the adverse possessor are by definition contrary to such considerations. Fogal's "right" in this case was created in antithesis to that of the company.

Appellant and the majority opinion rely on Supreme Court rulings in *Missouri Valley Land Co. v. Wiese*, 208 U.S. 234 (1908); *Iowa Railroad Land Co. v. Blumer*, 206 U.S. 482 (1907); *Toltec Ranch Company v. Cook*, 191 U.S. 532 (1903); and *Deseret Salt Co. v. Tarpey*, 142 U.S. 241 (1891), to support a view that an adverse possessor can succeed to the rights of an innocent purchaser for value. However, as

stated in *Lester J. Hamel*, 74 I. D. 125 (1967), referring to those specific cases:

Assuming still that Hamel's predecessors had acquired the railroad's title to lot 9 by adverse possession, what was the effect of that action as against the United States, which still has the record title? The Supreme Court cases cited did not reach this question since in those cases the lands involved had been patented or certified (the equivalent of patenting) to the railroads or their successors and the controversies were between the adverse claimants and the holders of record title to the lands. \* \* \*

*Id.* at 130.

In addition to the fact that in those cases the Supreme Court was dealing with situations where the conflict was between private persons, and the record title had been conveyed by the United States, state law was applied in determining the rights of the respective parties. *See also, Northern Pac. Ry. Co. v. Townsend*, 190 U.S. 267, 270 (1903). Furthermore, they all arose prior to the Transportation Act. They were not concerned with the question involved here as to the effect of that Act and the release and whether an adverse possessor in the position of Fogal may seek to overturn the effect of the release by the railroad. They are certainly not precedent for a conclusion that patent must issue in this case if it is found title once passed to the railroad company and the land had been sold to an innocent purchaser for value, where a party not in privity with the purchaser is the real party demanding patent. The *Hamel* decision comes

LLOYD D. HAYES, INTERVENOR

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closest to the present case, but does not stand as a holding which could support appellant's position. Indeed, it held that because the railroad company had filed a release under the Transportation Act of 1940 there was no authority to patent the land to the railroad. The decision does not disclose whether the railroad had ever conveyed the land to anyone so that the issue raised here was not discussed, but in view of the rationale used, I fail to see that would make any difference.

Another prior Departmental decision, *Martin v. Lord*, 59 I.D. 435 (1947), raised the question of an adverse possessor's right to purchase under sec. 5 of the Act of Mar. 3, 1887, 43 U.S.C. § 897 (1970). That provision permitted a bona fide purchaser from a railroad company of lands within the primary grant to the company, but which lands were excepted from the grant, to purchase the lands from the United States subject to certain exceptions. The decision refused to decide the question whether the adverse possessor could be allowed to purchase under that Act. The case noted, however, at 443, that a previous Departmental decision had ruled *Martin* was ineligible to purchase under the 1887 Act because her asserted interest was based on a tax title. I submit that the reasoning which would preclude the holder of a tax title to purchase because she is not in privity with the original purchaser is as aptly applied to an adverse possessor as to the holder under the tax

title. I see no basis for concluding that an adverse possessor could be considered a "bona fide purchaser" under sec. 5 of the 1887 Act. That provision merely affords a bona fide purchaser a personal privilege to purchase. It did not establish an absolute right protected from subsequent legislative reservations. *E.g., Anderson v. McKay*, 211 F. 2d 798 (D.C. Cir. 1954), holding that a reservation of certain minerals by an Act passed before the purchaser applied for patent, but after he had purchased from the railroad, was effective. Also, the privilege must be exercised within a reasonable time. *Ramsey v. Tacoma Land Company*, 196 U.S. 360 (1905). The equities that Congress had in mind in permitting a bona fide purchaser to purchase land in which there was a defect of title would not apply to an adverse possessor.

It is hornbook law that a person can gain no rights against the United States by his adverse possession of land in the absence of a specific statute permitting purchase, such as the Color of Title Act, 43 U.S.C. § 1068 (1970). Nevertheless, the majority is permitting an adverse possessor to obtain rights by legalistic reasoning which fails to differentiate between the situation in the cases arising prior to the Transportation Act of 1940 and the facts and law in this case, ignoring the principle *cessante ratione legis, cessat et ipsa lex* (the reason of the law ceasing, the law itself also ceases).

Let us consider Fogal's position in this case. He bases his title upon the acquisition of unpatented mining claims on Jan. 27, 1934. Those claims were declared null and void by the Department in *United States v. Fogal*, A-28233 (May 10, 1960). Thereafter, on May 10, 1961, the Empire Consolidated Group (of which Fogal is a party) filed notices of location of placer mining claims for the same lands. The Group subsequently quitclaimed them to Fogal by deeds recorded Mar. 24, 1971. Thereupon, Fogal obtained his quiet title decree in a state court. We cannot close our eyes to Fogal's position. The regulations regarding the issuance of patents under the Transportation Act of 1940 require that an application filed under the Act by the carrier for its purchaser must include certain detailed showings, including the following:

\* \* \* Full details of the alleged sale must be furnished, such as dates, the terms thereof, the estate involved, consideration, parties, amounts and dates of payments, made, and amounts due, if any, description of the land, and transfers of title. The use, occupancy, and cultivation of the land and the improvements placed thereon by the alleged purchaser should be described. All statements should be duly corroborated. \* \* \*

43 CFR 2631.1. That regulation goes on to require available documentary evidence, abstracts of title, etc., as necessary. It then states:

\* \* \* No application for a patent under this act will be favorably considered unless it be shown that the alleged purchaser is entitled forthwith to the estate and interest transferred by such patent. Evidence of a recorded deed of convey-

ance from the carrier to the purchaser may be required. \* \* \*

It is evident that the regulations envisage the beneficiary of the exception from the railroad releases to be an innocent purchaser for value from the railroad or someone in privity with the purchaser in a direct chain of title where the same estate and interest as the carrier would have is passed on. It obviously does not contemplate someone claiming under a different chain of title not in privity with the railroad.

Because of the release filed by the railroad, we cannot assume there is only a mere ministerial function to issue a patent. We have no authority to issue a patent except under the conditions permitted by Congress under the 1940 Act. Even if we assume the fact that the railroad company conveyed the land to an innocent purchaser for value and that title had passed to the railroad company, who may take advantage of the exception to the release under the Act? The regulations require that the purchaser (and we can fairly rule someone in privity with the purchaser), show he is entitled to the estate and interest transferred by the patent. While an adverse possessor may be said to acquire a complete title where patent has issued from the United States, where patent has not issued, as between him and the United States, he is simply an adverse possessor. Fogal's position over the years has been directly contrary to the position now claimed that title to the land passed from

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the United States to the railroad company. Prior to the 1940 Act, Fogal was claiming the land under the United States mining laws. This is a direct recognition of the superior title of the United States and is inconsistent with a claim that title was then in the railroad. While this case need not rest on such a ground, it may certainly be argued that Fogal should be estopped to claim that title was in the railroad company at any time he claimed the land. There certainly cannot be a good faith claim by him that title passed to the railroad company. The United States has asserted its interest in the land by contesting Fogal's mining claims. Any reasonable rule of statutory construction to be applied here would defeat an interpretation of the 1940 Act to require a patent to issue to an adverse possessor under these circumstances.

Because Fogal fortuitously obtained a state court decree quieting title in him after having been defeated in a mining contest, I cannot conclude he is an innocent purchaser for value within the meaning of the 1940 Act. Furthermore, even assuming the land had been sold to an innocent purchaser for value, I submit we have no authority to issue a patent in the absence of a clear showing that the innocent purchaser for value or someone in privity with him can show a right to the land as required by regulation 43 CFR 2631.1. This Department has rejected a simplistic argument that

where title passed to the carrier and the carrier had conveyed to an innocent purchaser for value, a patent must issue confirming title in someone. *Southern Pacific Company*, 76 I.D. 1, 4 (1969). It emphasized that the saving clause of sec. 321(b) of the Transportation Act does not operate automatically without any designation of land to be excepted from the release. If land was not included in the list of excepted lands filed with the release, an inference arises that the land applied for had not been listed because the railroad did not suppose it came within the scope of the saving clause. If land was listed as excepted from the release no legal significance would attach to that fact. The decision stated:

\* \* \* The Transportation Act itself specifies the circumstances which except land from a release filed by a railroad company under the act and commits to the Secretary of the Interior the responsibility for determining where those circumstances exist. If the specified conditions are not found, the inclusion of a tract of land by a railroad company in its list of excepted lands cannot except that land from the effect of a release. In other words, the list of sold lands submitted with the release filed in 1940 was for informational purposes only.

*Id.* at 4-5. The decision concluded by holding:

\* \* \* We find only that a railroad cannot invoke the saving clause of section 321 without showing that application for patent is made on behalf of one who can assert the rights of an innocent purchaser for value. [Footnote omitted.]

*Id.* at 6.

In footnote 2, the decision set forth the standard definition and criteria in determining an "innocent purchaser for value":

"The term 'innocent purchase[r] for value,' as used in the Transportation Act, must be understood in its ordinary commercial sense, and it has long been understood by the courts to describe one who purchases in good faith and for value. *Chapman v. Santa Fe Pac. R. Co.*, 198 F. 2d 498, 502 (D.C. Cir. 1951). It is essentially equivalent in meaning to 'bona fide purchaser.' See *Words and Phrases*, Innocent Purchasers for Value.

It is well settled that one who claims protection as a bona fide purchaser must be a purchaser for value and that the burden is upon him to show that he has paid value. See 46 Am. Jur., Sales, § 465. It is equally settled that one who himself qualifies as a bona fide purchaser is entitled to protection as such notwithstanding any lack of qualifications on the part of his immediate grantor, the original purchaser, or any intervening purchaser. 73 C.J.S. Public Lands § 167; 92 C.J.S. Vendor & Purchaser § 321. This latter principle has been expressly applied in cases arising under the act of March 3, 1887, as amended, 43 U.S.C. §§ 894-899 (1964), and involving purchasers of lands in canceled railroad grants. See Instructions, 11 L.D. 229 (1890); *Union Pacific Ry. Co. et al. v. McKinley*, 14 L.D. 237 (1892); *Union Colony v. Fulmele et al.*, 16 L.D. 273 (1893); *Sethman v. Clise*, 17 L.D. 307 (1893); *Ray et al. v. Gross*, 27 L.D. 707 (1898). It is clear, however, that the protection of the statute could be invoked only by, or for the benefit of, a bona fide purchaser. See *United States v. Southern Pacific R. R. Co.*, 184 U.S. 49, 60 (1902), in which relief was denied to one who entered into an agreement to purchase land from a party not entitled to invoke the protection of the 1887 act for the purpose of securing for that party the protection which it could not seek in its own right.

*Id.* at 5.

The application in this case was properly rejected because on its face it showed it was made on behalf of someone who is not an innocent purchaser for value and who cannot stand in the position of that purchaser by virtue of privity of title from him. This position is most in keeping with the purposes and policies manifest by the Transportation Act. There is no authority in the law for this Department to issue a patent to the railroad which will be on behalf of one claiming only as an adverse possessor even if the land is found to have been nonmineral in character and the original purchaser from the railroad is found to have been an innocent purchaser for value. A ruling contrary to this position opens the door to matters which have been deemed to have been closed over 30 years ago and affords opportunities for fraudulent claims by persons who have never recognized title in the railroad company and its transferees.

JOAN B. THOMPSON,  
*Administrative Judge.*

## ADMINISTRATIVE APPEAL OF JAMES MORGAN, JR.

v.

AREA DIRECTOR,  
ABERDEEN AREA OFFICE,  
*ET AL.*

5 IBIA 14

Decided *January 22, 1976*

Appeal from the decision of the Area Director, Aberdeen Area Office, Bureau of Indian Affairs, dated March 31,

AREA DIRECTOR, ABERDEEN AREA OFFICE, ET AL.

*January 22, 1976*

1975, declaring a lease approved by the Superintendent on November 5, 1974, null and void.

### AFFIRMED.

#### 1. Indian Lands: Leases and Permits: Generally

Leases may be granted by the Secretary pursuant to 25 CFR 131.2(a) (4) only where adult owners who qualify under 25 CFR 131.3 are unable to agree upon a lease.

APPEARANCES: Russel A. Eliason, of Ryan, Scoville, and Uhlir, for appellant, James Morgan, Jr.

### OPINION BY ADMINISTRATIVE JUDGE WILSON

#### INTERIOR BOARD OF INDIAN APPEALS

The Superintendent of the Winnebago Indian Agency, Nebraska, on Dec. 2, 1974, awarded a lease embracing 160 acres of land described as the SE  $\frac{1}{4}$ , section 7, Township 24, Range 10, Thurston County, Nebraska, to James Morgan, Jr., the appellant herein. Prior to awarding the lease, pursuant to 25 CFR 131.2 (a) (4), the land was advertised by the Superintendent on Nov. 5, 1974, for a period of 14 days. The appellant as the high bidder, was awarded the lease for a term of 5 years beginning Mar. 1, 1975, and ending Feb. 28, 1980.

The land being the original allotment of Simon Porter, Allottee No. 25-0, is owned by six individuals, four of whom are the appellees

herein. Subsequent to the approval of the lease by the Superintendent but prior to the beginning of its term, four of the six owners on Jan. 31, 1975, protested the action of the Superintendent by letter to the Area Director. Two of the protestors stated they never received their notice of May 14, 1974, wherein the Superintendent advised the owners that he would lease the land in question if no lease was negotiated by them within 90 days.

The Area Director considered the protest as an appeal and decided that the Superintendent had no authority to lease the property. On Mar. 31, 1975, the Area Director declared the lease null and void. The Superintendent on Apr. 2, 1975, advised the appellant of the Area Director's decision in the following manner:

Due to the action of Aberdeen Area Office, we can not accept your lease on the Simon Porter allotment, Allotment No. 25-0. Thank you for your interest.

The action referred to by the Superintendent in his letter of Apr. 2, 1975, was to the final paragraph of the Area Director's memorandum indicating the date of Feb. 2, 1975, which read as follows:

Upon a cursory examination of what has been submitted to us for review, I might call your attention to 54 IAM 5.3 and 25 CFR 131.6, which expresses that the Secretary is without authority to grant a lease on land of an adult Indian (except those who are not non-compositis and those whose whereabouts are unknown). I believe you will need to make a careful review of the action approving the lease to Mr. Morgan which

appears to have been granted under 25 CFR 131.2(a) (4).

On Apr. 16, 1975, the appellant filed with the Superintendent of the Winnebago Indian Agency, a petition seeking administrative review of the actions taken by the Area Director and the Superintendent. The petition was forwarded to the Commissioner, Bureau of Indian Affairs, who in turn referred the matter to this Board on June 25, 1975, for review and decision.

Paragraph 14 of the petition fairly sums up the appellant's argument for setting aside the action of the Area Director and the Superintendent and for declaring the appellant to be the lawful lessee of the allotment in question. Paragraph 14 reads as follows:

The United States, acting through their Department of Interior and Bureau of Indian Affairs, has the authority and duty to lease the allotment involved in this action, and having done so, the action is final and binding on all heirs and devisees and the Bureau of Indian Affairs. The Secretary of the Interior has the authority to approve all leases. He approved the lease in question, and the lessee has entered upon the land and began farming. It would be improper and illegal for the Secretary to approve any other lease.

The controversy appears to focus on the interpretation of 25 CFR 131.2(a) (4) which in relevant part provides:

(a) The Secretary may grant leases on individually owned land on behalf of; \* \* \* (4) the heirs or devisees to individually owned land *who have not been able to agree upon a lease* during the 3-month period immediately following the date on which a lease may be entered

into; provided, that the land is not in use by any of the heirs or devisees; \* \* \*. [Italics supplied.]

[1] 25 CFR 131.2(a) (4) uses the discretionary words "may grant." Clearly, the purpose of this section is not meant to force heirs or devisees into negotiations. Rather, this section gives the Secretary the authority to grant leases only if the heirs or devisees *have been unable to agree on a lease* and not on the mere fact that the heirs or devisees have not entered into a lease within the 90-day period.

The failure of the owners to respond or comply to the Superintendent's notice of May 14, 1974, cannot be interpreted as inability on the part of the owners to negotiate a lease, nor does it indicate disagreement per se.

The Board notes that the owners, although living in different parts of the country, have in the past been able to negotiate leases on the allotment in question. There apparently has been no disagreement among the heirs in the past regarding lease negotiations.

Clearly, the record is void of any evidence to indicate the owners were actually unable to agree to a lease. At most, disagreement can only be inferred by the owners' nonresponse to the Superintendent's notice. Under the foregoing circumstances, the Superintendent was without authority to award a lease on the premises on behalf of the adult owners who qualified to negotiate leases under 25 CFR 131.3.

Moreover, contrary to the appel-

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lant's contention, the unauthorized action of the Superintendent in awarding the lease in question is not final and binding upon the Secretary.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Area Director dated March 31, 1975, and the Superintendent's action of April 2, 1975, concurring thereto, declaring appellant's lease null and void, is hereby **AFFIRMED**.

This decision is final for the Department.

ALEXANDER H. WILSON,  
*Administrative Judge.*

I CONCUR:

MITCHELL J. SABAGH,  
*Administrative Judge.*

JEANNE PIERRESTEGUY

23 IBLA 358

Decided, *January 23, 1976*

Appeal from a decision of the Nevada State Office, Bureau of Land Management, rejecting appellant's color of title application (N 6444).

Affirmed as modified.

1. Color or Claim of Title: Generally—Withdrawals and Reservations: Effect of—Withdrawals and Reservations: Stock-driveway Withdrawals

A color of title application for land which has been withdrawn for a stock-driveway prior to any conveyance in a color of title applicant's chain of title is properly rejected as to such land.

2. Administrative Procedure: Burden of Proof—Color or Claim of Title: Applications

An applicant under the Color of Title Act, 43 U.S.C. §1068 (1970), has the burden to establish to the Secretary of the Interior's satisfaction that the statutory conditions for purchase under the Act have been met.

3. Color or Claim of Title: Description of Land—Color or Claim of Title: Good Faith—Conveyances: Generally

A color of title application is properly rejected where the applicant has failed to establish how conveyances in her chain of title describing lands different from that described in her application, and different from each other, give color of title to the applied for land for the requisite period of time.

4. Color or Claim of Title: Description of Land—Color or Claim of Title: Good Faith—Conveyances: Generally

Generally, conveyances which describe only a "possessory interest" in a parcel of land do not constitute a claim or color of title within the contemplation of the Color of Title Act.

APPEARANCES: A. D. Demetras, Esq., Reno, Nevada, for appellant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON  
INTERIOR BOARD OF LAND APPEALS

This is an appeal from a decision of the Nevada State Office, Bureau of Land Management (BLM), dated June 16, 1975, rejecting appellant's class 1 color of title purchase application for the NE $\frac{1}{4}$  NE $\frac{1}{4}$  SE $\frac{1}{4}$  NE $\frac{1}{4}$ , SE $\frac{1}{4}$  NE $\frac{1}{4}$  NE $\frac{1}{4}$ , E $\frac{1}{2}$  NE $\frac{1}{4}$  NE $\frac{1}{4}$  NE $\frac{1}{4}$  of sec. 11, and the N $\frac{1}{2}$  SW $\frac{1}{4}$  NW $\frac{1}{4}$ , S $\frac{1}{2}$  NW $\frac{1}{4}$

NW $\frac{1}{4}$  NW $\frac{1}{4}$ , NW $\frac{1}{4}$  SE $\frac{1}{4}$  NW $\frac{1}{4}$ , W $\frac{1}{2}$  NE $\frac{1}{4}$  SE $\frac{1}{4}$  NW $\frac{1}{4}$ , S $\frac{1}{2}$  NW $\frac{1}{4}$  NW $\frac{1}{4}$ , NW $\frac{1}{4}$  NW $\frac{1}{4}$  NW $\frac{1}{4}$  NW $\frac{1}{4}$  of sec. 12, in T. 22 N., R. 54 E., M.D.M., Eureka County, Nevada. The application, filed on May 1, 1972, was accompanied by a list of conveyances pertinent to appellant's claim of title. They all described a possessory interest in certain lands. Photocopies of the instruments (or abstracts thereof) from the County Recorder's office appear in the record.

Review of the master title plat indicates that fee simple title to the land described in the application is owned by the United States and that all of section 11 is withdrawn for a livestock driveway effective Mar. 21, 1919. The record contains a fairly extensive land report prepared by the BLM with respect to the subject land. The report disclosed the absence of private land in Homestead Canyon where the applied-for land is located. Lands in the vicinity have been used primarily for livestock grazing and mineral exploration. The report states that "No valuable improvements are located on the subject land and none of the land shows evidence of agricultural development."

It is noted in the report that the subject lands were apparently developed as a homesite some time in the early 1900's, that a rock cabin at the site was probably developed at that time, and that a small area of the site was fenced at the time of the original development. The report goes on to state that, "because the

subject land has been unfenced and relatively unimproved it has been managed as National Resource Land." Finally, the report reveals that "[t]he subject lands are located within the Blackpoint Grazing Allotment and are grazed by livestock owned by Bill Harris."

The decision of the BLM rejected the application because: (1) the land in section 11 was withdrawn prior to initiation of the claim; (2) there was an absence of valuable, existing improvements on the land; (3) there were breaks in chain of title to the land based on the variance in descriptions between the first instruments of title, the later instruments, and the description in the application; and (4) deeds purporting to convey a "possessory interest" are not effective as color of title.

Appellant argues on appeal that the old cabin and fence on the land are in fact valuable improvements and that a "possessory interest" is sufficient to establish color of title.

The Color of Title Act, 43 U.S.C. § 1068 (1970), provides, in part, as follows:

The Secretary of the Interior \* \* \* shall, whenever it shall be shown to his satisfaction that a tract of public land has been held in good faith and in peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for more than twenty years, and that valuable improvements have been placed on such land \* \* \* issue a patent for not to exceed one hundred and sixty acres of such land \* \* \*.

[1] A purchase application under the Color of Title Act may not be based upon a claim initiated on

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withdrawn on reserved lands. *Ben J. Roschetto*, 21 IBLA 193 (1975); *Alva M. Knorr*, 14 IBLA 237, 241 (1974); 43 CFR 2540.0-5(b). The first deed in appellant's chain of title is dated after the land in section 11 was already withdrawn for a stock-driveway pursuant to the Act of Dec. 29, 1916, *as amended*, 43 U.S.C. § 300 (1970). Therefore, the application must be rejected as to the land in section 11 because of the withdrawal, apart from other reasons.

[2] An applicant under the Color of Title Act has the burden to establish to the Secretary of the Interior's satisfaction that the statutory conditions for purchase under the Act have been met. *Homer W. Mania*, 63 I.D. 249, 251 (1956). This burden has not been met in this case.

[3] A review of the chain of title reveals the basic inadequacy in appellant's showing of a holding of the land for the requisite time under a claim or color of title. The first deed shown on the form accompanying appellant's application is dated Feb. 21, 1933, and describes a,

Possessory interest in and to a tract of land situated in Diamond Valley, Eureka County, Nevada, and about three miles south of the "Maggini Ranch" in said County, consisting of 80 acres, unsurveyed land.

The second deed, dated Feb. 7, 1934, described,

\* \* \* a possessory interest in and to a tract of land situated in Diamond Valley, Eureka County, Nevada, and about three miles in a southerly direction from the Maggini ranch in said county, consisting of about 80 acres, unsurveyed land, and

what will probably be when surveyed, or located therein, the W.  $\frac{1}{2}$  NW  $\frac{1}{4}$  of Section one, and NE  $\frac{1}{4}$  NE  $\frac{1}{4}$  of Section two, all in township twenty two, north, range 54 east, M.D.B.M.

The third deed in 1945 is significant as the grantee was appellant's husband, Bertrand Arambel. This deed conveyed certain land described by legal subdivision in White Pine County. It also listed certain water rights and interests and then other "pieces and parcels of land, and water rights located in EUREKA COUNTY, STATE OF NEVADA," and recited the same description quoted above contained in the 1934 instrument. The fourth instrument in the chain is dated Dec. 19, 1957, whereby Bertrand Arambel and Mary Jean Arambel, his wife, conveyed to themselves as "joint tenants with right of survivorship" of the real property owned by them in certain counties in Nevada. The parcels of property are not set forth. The next instrument gives an entirely different description from the descriptions in the previous instruments. It is a court decree, dated Aug. 10, 1964, distributing the assets of the estate of Bertrand Arambel to appellant whose name is given as Jeanne Arambel, a/k/a Marie Jeanne Arambel, Jeanne Marie Arambel, Mary Jean Arambel. The instrument includes the following description of land in T. 22 N., R. 54 E., M.D.B. & M.:

Section 12: Possessory interest in land approximately in the NE  $\frac{1}{4}$  of SE  $\frac{1}{4}$ ; NW  $\frac{1}{4}$  of SW  $\frac{1}{4}$ .

The last instrument is a deed, dated Jan. 16, 1967, from appellant to herself and her husband, Auguste Pierresteguy, as joint tenants with survivorship, containing the same description as the court decree.

In examining these descriptions, it is apparent that the 1934 deed and 1945 deeds purport to describe unsurveyed land. The description of the land as it will probably be when surveyed constitutes a contiguous parcel. However, the 1964 court decree and deed of 1967 describe land approximately in two separate quarter-quarter parcels which are one-half mile apart. The description in the application again describes a completely contiguous parcel, albeit a somewhat irregularly sided tract. The field report discloses that T. 22 N., R. 54 E., M.D.B.M., was surveyed in 1937. Only the application gives a description according to the survey. The deeds and court decree in 1964 describe the land as unsurveyed but give a description of what the land will probably be when surveyed. None of those probable descriptions embrace any of the land as described in the application. Furthermore, there is no explanation of the change in the description in the 1964 decree which gives two separate tracts of land widely separate from each other, rather than a contiguous parcel as described in the prior conveyances.<sup>1</sup> Neither of the

tracts in the 1964 decree embrace land described in the application, although the land is in the same section.

Although appellant claims she can supply deficiencies in the chain of title, she has offered no explanation as to how any of the conveyances in her chain of title can give color of title to the subject land when it is not included within the description of the land. The most the record shows in this connection is a letter to her from Wallace T. Boundy, dated Dec. 23, 1970, giving a description of his survey of land embracing the cabin and old fences. He stated:

The following is a legal description of the 80 acre Homestead situated in Homestead Canyon on the East side of Diamond Valley. This legal description should tend to replace the one now on file in the Eureka County Court House.

This legal description has been compiled from field notes of a survey made under my supervision on November 24th, 1970. The area we have surveyed and described herein takes in 80 acres of the most logical bottom ground surrounding the old fences and Stone Cabin still in existence.

This explanation given by appellant's surveyor indicates that the description in the application was achieved from his survey to include "the most logical bottom ground surrounding the old fences and Stone Cabin." There is no explanation or attempt to correlate the new description with the old descriptions or to show that the parties to the conveyances of record understood the descriptions to cover such "bottom ground." The instruments in the

<sup>1</sup> Appellant apparently was the beneficiary and executrix of the estate. We note that one executing an estate for his own behalf cannot by describing lands in the administration of an estate create one's own title, or color of title, to land where none existed before. *Bryan N. Johnson*, 15 IBLA 19 (1974).

chain of title do not refer to the cabin, the fences, or anything which would illustrate that such land was intended. On the face of the record as it now stands there is nothing which satisfactorily ties the land applied for with the conveyances. Appellant indicated she first knew she did not have clear title to the land in 1970. The provision of the Color of Title Act under which appellant applied requires a holding under claim or color of title for at least 20 years. Her chain of title describing land in section 12—which is not the land in the application—goes back only to 1964. That description is entirely different from the prior descriptions.

Generally there can be no color of title to land which is not embraced in a description in some instrument of conveyance. *Cloyd and Velma Mitchell*, 22 IBLA 299 (1975); *William P. Surman*, 18 IBLA 141 (1974); *Marcus Rudnick* 8 IBLA 65 (1972). Further, a mistaken belief that land may be included within a description is not a sufficient basis for concluding land has been held in good faith under a claim or color of title. *Id.* On the basis of the present record we must conclude there is insufficient information which would establish a good faith holding of the land described in the application under a claim or color of title sufficient to meet the requirements of the Color of Title Act.

[4] There is an additional reason for rejecting appellant's application. All of the instruments in her chain of title refer to a "possessory

interest in land." It is axiomatic that adverse possession alone against the United States creates no right to land. *E.g.*, *Beaver v. United States*, 350 F. 2d 4 (9th Cir. 1965), *cert. denied*, 383 U.S. 937 (1966). The purpose of the Color of Title Act was to enable persons who believed, with good reason, that they had title to land to purchase such land upon finding the defect in their title. The appellant's mere statement, without any support in reason or the law, that a "possessory interest" can constitute a color of title cannot be accepted. The use of the term in these instruments suggests something other than title; otherwise, its use in an instrument of conveyance would be redundant. The specific qualification that only a "possessory interest" is being conveyed appears to be a limitation on the quantum of the interest, and a recognition that something less than a fee simple title is being conveyed. Without more, we cannot accept conveyances which limit the estate being conveyed to a "possessory interest" as constituting a claim or color of title within the contemplation of the Color of Title Act. Appellant has not shown why she or her predecessors could believe in good faith that they had fee simple title to land under conveyances which purport only to convey a "possessory interest in land." *Cf. Thomas Ormachea*, A-30092 (May 8, 1964).

We must conclude that appellant has failed to show that the land was held in good faith under some instrument giving the requisite color

of title.<sup>2</sup> The decision is modified to reflect the reasons stated above as the bases for our affirmance.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed, as modified, for the reasons stated in this decision.

JOAN B. THOMPSON,  
*Administrative Judge.*

WE CONCUR:

MARTIN RITVO,  
*Administrative Judge.*

EDWARD W. STUEBING,  
*Administrative Judge.*

ROSCOE PAGE, ET AL.

v.

VALLEY CAMP COAL COMPANY

6 IBMA 1

Decided January 28, 1976

Appeal by Valley Camp Coal Company from a decision by Administrative Law Judge Forrest E. Stewart (Docket No. HOPE 75-702), dated June 26, 1975, granting compensation to miners pursuant to sec. 110(a) of the Federal Coal Mine Health and Safety Act of 1969.

Affirmed.

<sup>2</sup> In view of this conclusion it is unnecessary to determine whether the dilapidated structures on the property may be considered "valuable improvements" within the meaning of the Color of Title Act. Cf. *Lena A. Warner*, 11 IBLA 102, 106 (1973); *Virgil H. Menefee*, A-30620 (Nov. 23, 1966).

# Federal Coal Mine Health and Safety Act of 1969: Entitlement of Miners: Compensation: Generally

Miners are entitled to compensation under sec. 110(a) of the Act when secs. 103(f) and 104(c) withdrawal orders are in effect concurrently even if the 103(f) order was issued first. Such compensation, however, is computed with reference only to the duration of the sec. 104(c) orders.

APPEARANCE: Charles Q. Gage, Esq., for appellant, Valley Camp Coal Company.

OPINION BY CHIEF ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF MINE OPERATIONS APPEALS

*Factual and Procedural Background*

On Jan. 10, 1975, at about 7:30 a.m., a mine fatality occurred at Valley Camp Coal Company's (Valley Camp) No. 15 Mine, located at Mammoth, West Virginia. Thereafter, all of the men voluntarily withdrew from the mine as permitted by their wage agreement. The Mining Enforcement and Safety Administration (MESA), through its inspector Jack M. Campbell, issued an order of withdrawal pursuant to sec. 103(f) of the Federal Coal Mine Health and Safety Act of 1969 (Act)<sup>1</sup> at approximately 11:15 a.m. on the same day, Jan. 10, 1975. Inspector Campbell thereafter between 12:30 and 1:30 p.m. on the same day issued Orders of With-

<sup>1</sup> 30 U.S.C. §§ 801-960 (1970).

drawal 1 JMC, 2 JMC, and 3 JMC, each pursuant to sec. 104(c) (2) of the Act.

An application for compensation was filed on Feb. 10, 1975, by counsel representing the miners detailed hereinafter (miners). At a hearing in Charleston, West Virginia, on Apr. 10, 1975, the miners, Valley Camp, and MESA (as *amicus curiae*) were each represented. There were no factual issues in dispute and the validity of the orders of withdrawal was uncontested. The parties stipulated to the compensation that would have been due the miners in this matter had they worked in Valley Camp's mine on Jan. 13, 1975, Jan. 14, 1975, and Jan. 15, 1975. On June 26, 1975, Judge Stewart entered his Decision and found that the miners were entitled to the compensation listed in the stipulation. No prayer was made for compensation beyond the amounts contained in the stipulation. No explanation was provided as to why the prayer was limited to compensation on the 13th, 14th and 15th of Jan. since the orders were issued on the 10th of Jan.

On July 16, 1975, Valley Camp filed a timely Notice of Appeal and on Aug. 4, 1975, it filed an Appellant's Brief with this Board. No response was received from the above styled miners or MESA.

### *Contentions on Appeal*

Valley Camp relies in its brief on the following language in sec. 110(a):

\* \* \* If a coal mine or area of a coal mine is closed by an order issued under section 104 of this title for an unwarrantable failure of the operator to comply with any health or safety standard, all miners who are idled due to such order shall be fully compensated \* \* \*. (Italics added.)

This language is relied upon by Valley Camp to stand for the proposition that in order for the miners to be entitled to the compensation mentioned in sec. 110(a), a sec. 104(c) order must be the first order to officially mandate the withdrawal and consequent idlement of the miners. Since the 103(f) order was the first one issued, it is contended that that order "idled" the miners. No position is stated as to the effect of the 104(c) orders remaining in existence after the 103(f) order was terminated. It is argued not that the 103(f) order preempted the 104(c) orders but that section 110(a) does not apply unless the order which first officially "idled" the miners was a sec. 104 order.

The miners in the instant case did not file a brief on appeal. Their contention before the Judge was that secs. 104(c) and 103(f) were designed to accomplish different purposes and the Congressional intent behind the passage of sec. 104 was, *inter alia*, to allow compensation under sec. 110(a) for miners idled by sec. 104 orders. Further, the miners argued, the practical effect of the 104(c) orders was that no miner could return to work until each order was terminated. This proposition was pointedly demonstrated by the fact that although the 103(f)

order was vacated on Jan. 14, 1975, no work could resume until Jan. 15, 1975, when the 104(c) orders were terminated.

### *Issue Presented*

Are miners entitled to compensation under sec. 110(a) of the Act when the first official order of withdrawal resulting in idlement of miners was issued pursuant to sec. 103(f) but orders of withdrawal issued pursuant to sec. 104(c) were subsequently issued while the former order was still in effect?

### *Discussion*

In *United Mine Workers of America, District No. 31*,<sup>2</sup> the Board said:

\* \* \* Clinchfield argues that since the mine was voluntarily closed prior to issuance of the order, the miners were not idled by such order and that, therefore, section 110(a) is not applicable. We do not agree. \* \* \* Regardless of the sequence of events or the method by which the miners were originally withdrawn, a mine, or section thereof, is officially closed upon the issuance of an order pursuant to section 104, and the miners are officially idled by such order. \* \* \*

As the above reveals in part, we held in that case that when a mine is closed due to an action of the operator following an explosion and subsequently MESA issues a 104(a) order of withdrawal, the miners are entitled to compensation under sec.

110(a) from the date of the order. In the instant case there is a three-tiered sequence: voluntary withdrawal of the miners in accordance with their contract; an official order of withdrawal issued pursuant to sec. 103(f); and three official orders of withdrawal issued pursuant to sec. 104(c). The miners in the instant case were officially withdrawn by the 103(f) order. However, they were also officially withdrawn by the sec. 104(c) orders. The language in sec. 110(a) of the Act allows compensation to miners who are "idled" by a 104(c) order. There is nothing in the language of that section to indicate that compensation for miners will not lie when there are two different orders of withdrawal in effect concurrently. Additionally, that section does not require the 104 order to be the first official one. Sequence, as implied by the *United Mine Workers of America* decision (*supra*), is not the essence of the applicability of sec. 110(a). The essence is the effective date of the issuance of the sec. 104 order of withdrawal.

Secs. 103(f) and 104(c) orders are designed to achieve different ends. Clearly, by its own language, sec. 103(f) operates to provide the inspector with emergency powers in the exigencies of a situation wherein there is a mine accident for the purpose of protecting the health and safety of persons in the coal mine. A sec. 104(c) order, in addition to protecting the health and safety of

<sup>2</sup>1 IBMA 33, 41, 78 I.D. 153, 1971-1973 OSHD 15,367a (1971).

January 28, 1976

miners, operates to provide a sanction for a recalcitrant operator's unwarrantable failure to comply with the mandatory standards found in the Act and regulations. Further, a 104(c) order in combination with sec. 110(a), operates to provide compensation for miners forced to lose work due to this unwarrantable failure. The sequence of 103(f) and 104 orders bears no relationship to the manner in which secs. 104 and 110(a) operate together. Just as the issuance of a 103(f) order has the effect of officially mandating the withdrawal of miners whether or not they have already withdrawn, the issuance of a 104(c) order, for purposes of sec. 110(a) has the effect of officially idling the miners even though, in fact, they have already withdrawn from the mine voluntarily, or they have first withdrawn in compliance with a 103(f) order. Ergo, the miners in this matter were officially "idled" for the purposes of sec. 110(a) by the 104(c) orders of withdrawal upon their issuance notwithstanding the prior withdrawal required by the 103(f) order. Idlement for purposes of sec. 110(a) began on Jan. 10, 1975, when the first 104(c) order was issued, and continued beyond Jan. 14, 1975, when the 103(f) order was terminated, until Jan. 15, 1975, the date of the termination of the three 104(c) orders of withdrawal.

The amounts in the following schedule of payments stipulated to by the parties for the days of Jan. 13, 14 and 15, 1975, were found by the Judge to be due and owing by Valley Camp to the miners listed therein who are also parties to this matter.

Name	1/13/75	1/14/75	1/15/75	Total
Roscoe Page.....	\$49.23	—	—	\$49.23
Victor				
Washington....	\$51.98	\$51.98	—	\$103.96
Franklin				
Campbell.....	\$51.98	\$51.98	—	\$103.96
Keith Agee.....	\$49.23	\$49.23	—	\$98.46
Thomas Page.....	\$49.23	\$49.23	—	\$98.46
Don Rains.....	\$49.23	\$49.23	—	\$98.46
Gary Brown.....	\$55.00	\$55.00	—	\$110.00
Joe Adkins.....	\$47.03	\$47.03	—	\$94.06
Danny Trent....	\$55.00	\$55.00	—	\$110.00
Charles Keenan..	\$51.98	\$51.98	—	\$103.96
James				
Schoolcraft....	\$55.00	\$55.00	—	\$110.00
Clarence Stone..	\$47.03	\$47.03	—	\$94.06
Robert Myers...	\$51.98	\$51.98	—	\$103.96
Michael				
Campbell.....	\$47.03	\$47.03	—	\$94.06
Stephen				
Sizemore.....	\$49.23	\$49.23	—	\$98.46
Maxie Goodwin..	\$51.98	\$51.98	\$51.98	\$155.94
Nelson Metz.....	\$49.23	\$49.23	\$49.23	\$147.69
Howard				
Murphy.....	\$47.03	\$47.03	\$47.03	\$141.09
Roy Balser.....	\$51.98	\$51.98	\$51.98	\$155.94
John Qualls.....	\$55.00	\$55.00	\$55.00	\$165.00
Daniel Stephens..	\$51.98	\$51.98	\$51.98	\$155.94
Clyde Foster....	\$49.23	\$49.23	\$49.23	\$147.69
Galen				
Carpenter.....	\$49.23	\$49.23	\$49.23	\$147.69
Ronald Cochran..	\$47.03	\$47.03	\$47.03	\$141.09
Total.....				\$2,829.16

We find no reason to overturn the Judge's findings of fact and conclusions of law, or inquire further into the calculations for compensation beyond the amounts stipulated.

## ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision in the above-captioned case IS AFFIRMED and that the above sums totaling \$2,829.16 be paid to the

respective miners indicated above within 30 days of the date of this Decision.

DAVID DOANE,

*Chief Administrative Judge.*

I CONCUR:

HOWARD J. SCHELLENBERG, JR.,  
*Administrative Judge.*

*February 4, 1976***STANLEY M. EDWARDS****24 IBLA 12***Decided February 4, 1976*

Appeal from decisions of Wyoming State Office, Bureau of Land Management, rejecting noncompetitive oil and gas lease offers W 47844, W 47845, W 47846, W 47847.

Set aside and remanded.

**1. Oil and Gas Leases: Discretion to Lease**

In the absence of a withdrawal of land from mineral leasing, public lands are subject to leasing for oil and gas in the discretion of and under conditions imposed by the Secretary of the Interior.

**2. Oil and Gas Leases: Generally—Oil and Gas Leases: Consent of Agency**

The recommendations of the Forest Service are important in determining whether or not an oil and gas lease should issue for public lands but are not conclusive. Ultimately, the Secretary of the Interior is entrusted with the responsibility of determining whether or not to issue a lease.

**3. Oil and Gas Leases: Lands Subject To—Wilderness Act**

Public lands in national forests are presently open to oil and gas leasing regardless of whether they are part of an officially designated wilderness area. However, where the land is within such an established wilderness area, the Secretary of Agriculture has the statutory authority to prescribe reasonable stipulations for the protection of the wilderness character of the land consistent with the use of the land for the purpose of the lease, although only the Secretary of the Interior may close the land to leasing or prohibit the issuance of a lease.

**4. Oil and Gas Leases: Consent of Agency—Oil and Gas Leases: Discretion To Lease**

Where the Bureau of Land Management rejects an oil and gas lease offer for public lands within a national forest solely on the objection of the Forest Service and where the Bureau officials did not make an independent determination whether leasing the lands is or is not in the public interest, the rejection is not a proper exercise of discretion and the case will be remanded to the Bureau for further consideration.

**APPEARANCES:** Michael J. Sullivan, Esq., Casper, Wyo., for appellant.

*OPINION BY ADMINISTRATIVE JUDGE STUEBING*

*INTERIOR BOARD OF LAND APPEALS*

Stanley M. Edwards appeals from decisions dated Sept. 23 and Oct. 2, 1974, of the Wyoming State Office, Bureau of Land Management, rejecting noncompetitive oil and gas lease offers W 47844, W 47845, W 47846 and W 47847 for lands within the Shoshone National Forest. The sole reason given for the rejection of W 47844 was that the Forest Service objects to leasing for oil and gas. The other offers were rejected because the lands in the offer are within the boundaries of the Washakie Wilderness and the Forest Service recommends that the lands not be leased.

On appeal, Edwards asserts that under sec. 17(c) of the Mineral Leasing Act, 41 Stat. 437, 30 U.S.C. § 226(c) (1970), the applicant

"shall be entitled to a lease" where noncompetitive lease offers are filed on public domain or acquired lands. He submits that the Secretary of the Interior has no discretion in the issuance of a lease where the application is on a noncompetitive basis.

Assuming *arguendo* that discretion does exist, appellant contends that the rejections were an abuse of discretion. He asserts that the decision was arbitrary and capricious, based upon the recommendation of the Forest Service without regard to public interests or without a factual basis.

Appellant further contends that the rejections were contrary to the Department's multiple use concept. He reasons that the Department has broad discretion in prescribing terms and conditions regarding the conduct of operations under an oil and gas lease. Accordingly, he continues, the Department, in exercising its discretion, can prescribe terms and conditions which it deems adequate to resolve any conflicts between competing uses. Appellant expresses his willingness to enter into stipulations which the Forest Service might deem appropriate for the restriction of leasehold operations on the lands and believes that such action would serve to encourage the multiple use concept and obtain the greatest net public benefit from the lands in question.

[1] Appellant's assertion that the Secretary of the Interior has no discretion in the issuance of noncompetitive oil and gas leases of public lands is incorrect. Under sec. 17 of

the Mineral Leasing Act the Secretary has plenary discretion to refuse an offer to lease. *E.g., Udall v. Tallman*, 380 U.S. 1 (1965); *Rosita Trujillo*, 21 IBLA 289 (1975). However, if the Secretary, or one exercising the duly delegated authority of the Secretary, does decide to lease a particular tract, he must issue the lease to the first qualified applicant therefor. *Yolana Rockar*, 19 IBLA 204 (1975); *Lloyd W. Levi*, 19 IBLA 201 (1975). In the absence of a withdrawal of land from mineral leasing, public lands ordinarily are subject to leasing for oil and gas in the discretion of, and under the conditions imposed by the Secretary. *Esdra K. Hartley*, 23 IBLA 102 (1975); *Duncan Miller*, 6 IBLA 216, 79 I.D. 416 (1972).

[2] Appellant's other contentions warrant consideration. Although the Secretary does have discretion in issuing oil and gas leases, a decision to reject a lease must have a reasonable basis. The recommendations of the Forest Service, Department of Agriculture, regarding national forest public lands are important in determining whether a lease should issue, but are not conclusive. *Esdra K. Hartley, supra*; *Bill J. Maddox*, 22 IBLA 97 (1975); *Beverley Lasrich*, 22 IBLA 202 (1975). Ultimately, the Secretary of the Interior is entrusted with the responsibility of determining whether to issue a lease. This is apparent in the cases dealing with stipulations in oil and gas leases. Although the Forest Service's recommendations for stipulations to

protect environmental and other land use values will be carefully considered, in most instances the Department of the Interior determines what stipulations must be required as a prerequisite to lease issuance. *Esdra K. Hartley, supra*; *Earl R. Wilson*, 21 IBLA 392 (1975). This Board has been insistent that proposed stipulations be reasonable. If the stipulation is unreasonable, it will be deleted, or the case will be remanded to the Bureau of Land Management for further consideration. *Earl Wilson, supra*; *Bill J. Maddox, supra*, *Duncan Miller, supra*.

Complete rejection of a lease offer is a more extreme measure than the most stringent stipulation. If the Board requires that a stipulation be based on valid reasons, it is even more compelling that a rejection should rest on a sound foundation.

[3] W 47844 was rejected because the Forest Service objects to leasing for oil and gas, and the foregoing discussion concerning stipulations relates principally to that case. The other three were rejected because the lands are within the boundaries of the Washakie Wilderness and the Forest Service recommends that the lands not be leased. The fact that lands are included in a wilderness area does not preclude the issuance of oil and gas leases for these lands.

There is a distinction to be drawn between the rules which apply to public land oil and gas lease offers for lands which have been included

officially in established National forest wilderness areas and lease offers for public lands in national forests which have not been so designated. Since this appeal involves offers for lands in both categories, this distinction should be clarified. Under the law, public lands in either category are presently open to oil and gas leasing. Both categories may be leased subject to reasonable stipulations for the protection of other resource values. The difference lies in the fact that where such lands are included in approved wilderness areas, the Secretary of Agriculture has the statutory authority to prescribe appropriate stipulations, whereas with regard to public lands in national forests which do not have wilderness designation, it is the Secretary of the Interior who has the authority to determine what stipulations should be imposed.

The Wilderness Act of Sept. 3, 1964, 16 U.S.C. § 1133(d) (3) (1970), provides:

(3) Notwithstanding any other provisions of this chapter, until midnight December 31, 1983, the United States mining laws and all laws pertaining to mineral leasing shall, to the same extent as applicable prior to September 3, 1964, extend to those national forest lands designated by this chapter as "wilderness areas"; subject, however, to such reasonable regulations governing ingress and egress as may be prescribed by the Secretary of Agriculture consistent with the use of the land for mineral location and development and exploration, drilling, and production, and use of land for transmission lines, waterlines, telephone lines, or facilities necessary in exploring, drill-

ing, producing, mining, and processing operations, including where essential the use of mechanized ground or air equipment and restoration as near as practicable of the surface of the land disturbed in performing prospecting, location, and, in oil and gas leasing, discovery work, exploration, drilling, and production, \* \* \*

Moreover, in addition to this authority for the Secretary of Agriculture to regulate ingress and egress, the same sec. provides:

Mineral leases, permits, and licenses covering lands within national forest wilderness areas designated by this chapter *shall contain such reasonable stipulations as may be prescribed by the Secretary of Agriculture* for the protection of the wilderness character of the land *consistent with the use of the land for the purposes for which they are leased*, permitted or licensed. Subject to valid rights then existing, effective January 1, 1984, the minerals in lands designated by this chapter as wilderness areas are withdrawn from all forms of appropriation under the mining laws and from disposition under all laws pertaining to mineral leasing and all amendments thereto. (Italics added.)

Departmental regulation 43 CFR 3111.1-3(f) implements the statute.

It must be noted that the authority vested in the Secretary of Agriculture to regulate ingress and egress and to prescribe stipulations for protection of the wilderness character of the land is conditioned in two respects. First, such regulations and/or stipulations must be "reasonable." Second, they must be consistent with the mineral use of the land. We find no authority, express or implied, for the Secretary of Agriculture to withdraw the land from

mineral leasing or to prohibit the issuance of a mineral lease. Indeed, the text quoted above would strongly suggest that the intent of the legislation was that these lands would continue to be available until 1984 on the same basis as they had been previously. Thus, an election to refuse to issue an oil and gas lease would continue to be at the discretion of the Secretary of the Interior upon a finding by him, or his delegate, that good cause therefor existed.

[4] Where BLM officials have carefully considered and weighed the multiple use factors and decided rejection of an offer is required in the public interest to protect special environmental and resource values, this Board has upheld such a rejection. *E.g., Rosita Trujillo, supra*. In the present case, however, the record does not show a proper exercise of discretion by BLM officials based upon an independent determination whether leasing these lands is or is not in the public interest. *Esdra K. Hartley, supra*.

The Bureau should analyze all factors involved and decide whether the leases should be rejected. One factor to be considered is appellant's willingness to accept reasonable stipulations for the protection of the lands. If, after deliberation, the Bureau decides to reject the offer, reasons for that decision should be enumerated.

Therefore, pursuant to the authority delegated to the Board of

February 4, 1976

Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the State Office is reversed and remanded to that office for further consideration.

EDWARD W. STUEBING,  
*Administrative Judge.*

WE CONCUR:

JOSEPH W. GOSS,  
*Administrative Judge.*

JOAN B. THOMPSON,  
*Administrative Judge.*

**POCAHONTAS FUEL COMPANY**  
**6 IBMA 14**

Decided *February 4, 1976*

Appeal by Pocahontas Fuel Company from a decision dated Aug. 12, 1975, by Administrative Law Judge James A. Broderick upholding the validity of an imminent danger withdrawal order issued pursuant to sec. 104(a) of the Federal Coal Mine Health and Safety Act of 1969 in Docket No. HOPE 75-716.

**Affirmed.**

**Federal Coal Mine Health and Safety Act of 1969: Imminent Danger: Proximate Peril**

A condition of float coal dust accumulations in energized electrical rectifier and starting boxes where arcing and sparking normally occur constitutes an imminent danger. 30 U.S.C. § 814 (1970).

**APPEARANCES:** L. Graeme Bell III, Esq., for appellant, Pocahontas Fuel

Company; Thomas A. Mascolino, Assistant Solicitor, Leo J. McGinn, Trial Attorney for appellee, Mining Enforcement and Safety Administration.

*OPINION BY*  
**ADMINISTRATIVE JUDGE**  
**SHELLENBERG**

*INTERIOR BOARD OF MINE*  
*OPERATIONS APPEALS*

*Background*

On Mar. 7, 1975, Withdrawal Order No. 1 JBF was issued in Pocahontas Fuel Company (Pocahontas) Modoc Mine in Mercer County, West Virginia. The order was issued pursuant to sec. 104(a) of the Federal Coal Mine Health and Safety Act of 1969 (Act)<sup>1</sup> and cited the following condition:

75.400

The No. 1 belt conveyer (sic), float coal dust in depths up to ¼ inch was allowed to accumulate in and around the rectifier and starting box for the No. 1 belt conveyer drive, float coal dust, loose coal (damp) and coal dust six inches deep (lesser amounts at different locations) starting at a point approximately 65 feet inby, the entire length of the belt conveyer.

On Mar. 21, 1975, Pocahontas filed an application for review pursuant to sec. 105(a) of the Act.<sup>2</sup> An evidentiary hearing before the Administrative Law Judge (Judge) was held on June 3, 1975, in Bluefield, West Virginia.

The Judge in his decision ac-

<sup>1</sup> 30 U.S.C. secs. 801-960 (1970).

<sup>2</sup> 30 U.S.C. sec. 815(a) (1970).

cepted the inspector's judgment that an imminent danger of explosion was presented by the float coal dust accumulations in the rectifier and starting box housings in which arcing from electrical circuits normally occurs. He therefore concluded that the withdrawal order was properly issued.

Pocahontas timely filed its notice of appeal from the Judge's decision on Aug. 25, 1975.

### *Issue on Appeal*

Whether the Judge erred in concluding that the subject withdrawal order was issued on the basis of a condition which at the time of issuance warranted a reasonable estimate or expectation that death or serious bodily injury would occur before elimination of the danger if normal operations to extract coal continued.

### *Discussion*

Relying on the Board's decision in *Rochester and Pittsburgh Coal Company*, 5 IBMA 51, 82 I.D. 368, 1975-1976 OSHD par. 19,884 (1975), Pocahontas contends that the Judge erred in upholding the withdrawal order in the instant case because the record fails to show a) that float coal dust was in suspension, and b) that there was a reasonable expectation, if normal mining practices were to continue, that sufficient quantities of float coal dust would be put into suspension to facilitate an ignition from an electrical arc or spark.

In *Rochester and Pittsburgh, supra*, the Board vacated an imminent danger withdrawal order based on float coal dust accumulations, after finding that the record demonstrated only speculative, remote potentialities for a disaster such as an explosion or belt fire. This result was reached because events which could have caused the float coal dust to go into suspension (a belt break or a rock fall) were merely possible, and also because there was no coincident expectation of a spark occurring at the time the order was issued.

In the instant case, a source of ignition was an uncontradicted circumstance at the time the order was issued. The inspector testified that arcing normally occurs within the rectifier and starting boxes (Tr. 59, 81) and the latter were energized when he arrived on the scene. The current coming into the boxes was 4160 volts AC (Tr. 18, 103). The operator's mine superintendent generally minimized the danger of alternating current,<sup>3</sup> but did not dispute that arcing and sparking normally occur in the energized rectifier and starting boxes. We find that the Judge correctly accepted the inspector's opinion on the point that arcing within the boxes presented an ignition source.

The inspector saw no float coal dust in suspension but ordered the power turned off when he saw settled float coal dust on top of the boxes. He then made measurements of the

<sup>3</sup> His statement: "You barely can see an AC current spark" (Tr. 103) is of scant probative value.

February 20, 1976

accumulations inside the boxes, finding settled dust up to one-fourth inch deep (Tr. 54, 55, 78).

Since a source of ignition is established, the imminency of the danger hinges on the likelihood of the float coal dust becoming suspended and thus presenting the requisite circumstances for an explosion. According to the inspector, suspension could be caused by the electrical energy in the boxes. He testified that the likelihood of an explosion was imminent since:

The electrical power itself breaking and creating an arc could disrupt the float dust in sufficient amounts to cause a small ignition which in turn would get larger going up the belt line. Tr. 59.

The inspector's opinion that electrical arcing could cause float coal dust to go into suspension and lead to an ignition in the electrical boxes is uncontradicted by witnesses for Pocahontas. We note in addition that suspended float coal dust would have to have been alighting on and in the boxes over quite some time to accumulate to a depth of  $\frac{1}{4}$  inch. Thus an additional hazard is presented during the course of accumulation. Since float coal dust is very light and easily disturbed, we believe that the inspector reasonably apprehended an imminent danger of explosion given the circumstances of the instant case. Pocahontas has not demonstrated how, in view of the evidence, the result reached by the Judge is erroneous. Accordingly, we will affirm the Judge's decision.

## ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision appealed from IS AFFIRMED.

HOWARD J. SCHELLENBERG, Jr.,  
*Administrative Judge.*

I CONCUR:

DAVID DOANE,

*Chief Administrative Judge.*

## CARBON FUEL COMPANY

6 IBMA 20

Decided February 20, 1976

Appeal by the Mining Enforcement and Safety Administration and the United Mine Workers of America from a decision by Administrative Law Judge Forrest E. Stewart, dated July 22, 1975, granting an Application for Review (Docket No. HOPE 75-800) and dismissing a Petition for Modification (Docket No. M 75-131) under the Federal Coal Mine Health and Safety Act of 1969.

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Mandatory Health Standards: Bathhouse and Changeroom Facilities

A violation of 30 CFR 75.1712-2, requiring that bathing and change-room facilities be provided in a central location convenient to all the miners where such facilities serve the miners of more than

one mine, is not proved when the evidence shows that the average distance from the six mines served is 2.1 miles and the portal of the mine farthest from such facilities is only 1.1 miles farther than the portal of the nearest mine.

**APPEARANCES:** Thomas A. Mascolino, Assistant Solicitor, Robert A. Cohen, Trial Attorney, for appellant Mining Enforcement and Safety Administration; Steven B. Jacobson, Esq., H. John Taylor, Esq., for appellant United Mine Workers of America; Charles Q. Gage, Esq., for appellee Carbon Fuel Company.

*OPINION BY CHIEF ADMINISTRATIVE JUDGE DOANE*

*INTERIOR BOARD OF MINE OPERATIONS APPEALS*

*Background*

On May 22, 1975, a federal coal mine inspector issued Notice No. 3 SAD at Carbon Fuel Company's (Carbon) No. 6A, 23 Drift Mine at Winifrede, West Virginia. The notice, issued pursuant to sec. 104(b) of the Federal Coal Mine Health and Safety Act of 1969 (Act),<sup>1</sup> cited the following condition:

The bathing facilities and change rooms provided for the use of the miners at this mine, was not conveniently located in that the mine is located a distance of 4 miles from the present facilities.

The parties subsequently agreed that the 4-mile figure in the notice was in error and that the correct distance between the bathhouse and the 6A, 23 portal is actually 3 miles.<sup>2</sup>

The standard alleged to be violated, 30 CFR 75.1712-2, provides:

Bathhouses, change rooms, and sanitary toilet facilities shall be in a location convenient for the use of the miners. Where such facilities are designed to serve more than one mine, they shall be centrally located so as to be as convenient for the use of the miners in all the mines served by such facilities.

On June 2, 1975, Carbon filed an Application for Review of the above notice and a motion for expedited hearing. It contended that the time set for abatement (1 month) was unreasonable, alleged that the bathhouse facilities serving its 6A, 23 Drift Mine were centrally located, and that the notice was therefore invalid. Carbon also filed a motion for extension of time for abatement and a Petition for Modification of 30 CFR 75.1712-2.<sup>3</sup>

On June 9 and 10, 1975, an expedited hearing was held in Charleston, West Virginia. The following evidence was adduced at the hearing. Carbon's 6A, 23 Drift Mine was first opened in April 1974. It employs 41 men on two production shifts and produces approximately 300 tons of coal in a 24-hour period. The estimated life of the mine is 7 years. The 6A, 23 Drift Mine is one of six mines in Carbon's Winifrede Division. All six of the mines are served by the single bathhouse cited

<sup>3</sup> The Petition for Modification was published in the *Federal Register* on June 17, 1975. It averred that the existing bathhouse facilities serving the 6A, 23 Drift Mine would at all times guarantee no less than the same amount of protection afforded the miners of this mine by the application of the above standard. It included a list of improvements contemplated for the existing facility if the Petition were granted.

<sup>1</sup> 30 U.S.C. §§ 801-960 (1970).

<sup>2</sup> Tr. 10, Applicant Exh. 1.

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in the notice of violation. The table below lists the distance in miles from each mine to the bathhouse:<sup>4</sup>

6A, 23 Drift	3.0
Morton Mine	1.9
45 Mine	2.2
31 Mine	2.1
31-2 Drift	2.2
No. 38 (Strip)	2.2

The road from the bathhouse to the portal of the 6A, 23 Drift Mine consists of 1 mile of hard surface and 2 miles of dirt road. All but about six of the miners pass the bathhouse on their way to and from work.<sup>5</sup>

Mining Enforcement and Safety Administration (MESA) Inspector Sonny A. Davenport, who issued the above notice, testified that he used his own judgment in making the determination that the bathhouse was not convenient for the miners at the 6A, 23 Drift Mine. He defined as "convenient" a situation where men could come out of a mine, take a shower, and change clothes without having to get into their cars and drive 3 miles (Tr. 129).

Mr. George M. Pritt, MESA Coal Mine Inspection Supervisor, who directed the inspector to issue the instant notice, testified that MESA had established no official policy or guidelines for interpreting the terms "convenient" and "centrally located" in 30 CFR 75.1712-2 (Tr. 23). He stated that the bathhouse was inconvenient with respect to the 6A, 23 Drift Mine to the extent that a man emerging from the mine "would be subject to at times being

wet, hot, dirty, tired—he'd have in the winter time a cold automobile to enter and drive 15 minutes before he can arrive at a place to find the facilities for washing, cleaning up, and put on dry, clean clothes" (Tr. 22). According to Mr. Pritt, a centrally located bathhouse would be one which was equidistant from all the mines it served. He felt that the bathhouse in the instant case was "reasonably convenient" (Tr. 58-59) for those mines within a 2-mile radius. On this basis, he found the bathhouse inconvenient for the miners at the 6A, 23 Drift Mine.

The Judge in his decision observed that Mr. Pritt's definition of "convenient" (a bathhouse located within 2 miles of a mine portal) conflicted with the inspector's definition (a bathhouse within walking distance of a mine portal). In view of the fact that MESA had no official guidelines for applying the terms of this regulation, he noted that the inspector's interpretation of convenient was vague and arbitrarily applied in an area where none of the mine portals was near enough to each other so that a centrally located bathhouse would be within walking distance. The Judge also considered the fact that most of the miners passed the bathhouse on their way to and from work as having a bearing on convenience and concluded that MESA had failed to make out a prima facie case of the alleged violation. He therefore granted the Application for Review, vacated the Notice of Violation and

<sup>4</sup> Applicant Exh. 1.

<sup>5</sup> Government Exh. 2.

dismissed without prejudice the Petition for Modification.

### *Contentions of the Parties*

MESA contends that the inspector's interpretation of the term "convenient" was reasonable and that the Judge erred in rejecting it.

The UMWA contends that the Judge misinterpreted the term "convenient" and that MESA correctly "drew a line" between mine portals located 2 and those located 3 miles from the bathhouse.

Carbon contends that the decision of the Judge is supported by a preponderance of the evidence and should be affirmed.

### *Issue*

Whether the Judge erred in concluding that MESA had failed to prove a violation of 30 CFR 75.1712-2.

### *Discussion*

For the following reasons we think that the Judge correctly vacated the notice of violation. The subject regulation does not require either that a bathhouse be located at each mine portal or that a bathhouse be located within walking distance where such facility serves more than one mine. Indeed, the regulation is silent on limitations in terms of distance. It requires a bathhouse that serves more than one mine to be centrally located for the convenience of

all the miners. In the present record the only fact of consequence which differentiates the 6A, 23 portal from the other portals in the Winifrede division is that the 6A, 23 portal is  $\frac{9}{10}$  of a mile farther from the bathhouse than the next closest portal. We cannot conclude that this increment in distance renders the 6A, 23 portal inconvenient with respect to the location of the bathhouse, especially when it is considered that most of the miners employed at the subject mine pass the bathhouse on their way home. We hold that under the facts of the present case the requirements of comfort and convenience prescribed by the regulation were met, and that the interpretations urged by MESA and the UMWA exceed those requirements.

Accordingly, the Judge's decision should be affirmed.

### ORDER

WHEREFORE, pursuant to the authority delegated to the Board of Mine Operations Appeals by the Secretary of the Interior (43 CFR 4.1(4)), the decision in the above-captioned proceeding IS AFFIRMED.

DAVID DOANE,  
*Chief Administrative Judge.*

I CONCUR:

HOWARD J. SCHELLENBERG, JR.,  
*Administrative Judge.*

**APPEAL OF  
PAUL E. McCOLLUM, SR.**

IBCA-1080-10-75

Decided *February 24, 1976*

Contract No. 52500-CT5-609, Las Vegas Pipeline Installation, Bureau of Land Management.

Denied.

**1. Contracts: Construction and Operation: Protests—Contracts: Disputes and Remedies: Generally—Contracts: Formation and Validity: Authority To Make**

Where a construction contractor contended that the contracting officer's enforcement of a contract requirement for roll-over protective structures on all equipment regardless of age constituted a change because the requirement was contrary to standards issued by the Secretary of Labor under the Occupational Health & Safety Act (29 U.S.C. § 651 *et seq.*) and therefore void, the Board examined the contention in the light of OSHA and also under the Contract Work Hours and Safety Standards Act (40 U.S.C. § 327 *et seq.*) and concluded that, while it was unlikely that either statute was intended to preclude a Federal agency from contractually imposing more stringent safety requirements than prescribed by the Secretary of Labor, it was not necessary to decide the question since appellant's remedy for an alleged illegal clause was a protest in other forums prior to bidding and award.

**APPEARANCES:** Mr. Paul E. McCollum, Sr., pro se, Yuma, Arizona, for the appellant; Mr. Gerald D. O'Nan, Department Counsel, Denver, Colorado, for the Government.

**OPINION BY ADMINISTRATIVE JUDGE NISSEN****INTERIOR BOARD OF  
CONTRACT APPEALS**

This appeal involves a claim for a constructive change which as originally asserted was in the amount of \$3,134.88. Neither party having elected a hearing, the appeal will be decided on the written record.

*Findings of Fact*

The contract awarded on June 24, 1975, is in the estimated amount of \$21,018.36 and called for the construction and installation, from materials to be furnished by the Government, of approximately 18.1 miles of polyethylene pipeline. The contract included Standard Form 23-A (October 1969 Edition).

Work was to be started within 10 calendar days and was to be completed within 45 calendar days after receipt of the notice to proceed. The record does not indicate the date the notice to proceed was issued or received by appellant.

Paragraph 26 of the Additional General Provision of the contract provides as follows:

26. Roll-over Protective Structures are required on all equipment, as defined in OSHA 1926.1000, regardless of age. Certification is required from the manufacturer or Registered Professional Engineer, that the ROPS meets the requirements of (1) OSHA Part 1926.1001 and 1002, (2) State of California Department of Industrial Relations (3) Division of Industrial Safety, Corps of Engineers, or (4) Similar recognized authorities.

In a letter, dated Aug. 15, 1975,<sup>1</sup> appellant advised the contracting officer in pertinent part:

We propose to use, on the above contract, a caterpillar tractor, Model D8 Serial Number 2U21006 manufactured in 1952. \* \* \*

OSHA does not require roll over protection for this machine. The California Department of Industrial Relation, Corps of Engineers, Bureau of Reclamation, nor any other specification of the Bureau of Land Management that I have seen, requires the roll over protection structure for this machine.

In fact it is our understanding that the new OSHA law amendments has [sic] provisions prohibiting any Federal Agency from enforcing or attempting to enforce any requirements not provided by OSHA. In other words, it is our understanding that OSHA is the Federal Safety Standards [sic] that is to be followed by all Federal Agencies.

We have been instructed verbally to comply with paragraph 26 which we did not anticipate when we bid the job, therefore; [sic] the cost of providing the roll over protection for the above machine is considered extra work and a claim for additional compensation. \* \* \*

Appellant estimated the total cost of purchasing and installing the ROPS to be \$3,134.88.<sup>2</sup>

In a letter, dated Aug. 19, 1975 (Exh. 3), the contracting officer acknowledged that the ROPS clause in the contract exceeded the mini-

mum requirements of law.<sup>3</sup> However, he pointed out that the clause was clear in requiring ROPS on all equipment regardless of age, that the clause would have applied equally to all of appellant's competitors in bidding on the project and that he had no alternative but to enforce the requirement as written. Appellant's claim for additional compensation was denied.

By letter, dated Sept. 10, 1975 (Exh. 4), appellant contended that it was not the intent of Congress that Federal agencies set standards different from those required under OSHA and that therefore Paragraph 26 of the contract was unlawful and unenforceable. A final decision of the contracting officer was requested. The contracting officer responded under date of Sept. 16, 1975 (Exh. 5), stating that the decision rendered in his letter of Aug. 19, 1975, was final. This timely appeal followed.

### *Decision*

Opposing the claim, the Government asserts that the claim is untimely in that appellant should have protested or sought clarification of the ROPS requirement prior to bid opening, that the contracting officer,

<sup>1</sup> Appeal file, Exh. 2. The record does not reveal the status of contract performance at this time.

<sup>2</sup> ROPS being in the nature of a capital improvement, it would seem to be clear that an appropriate equitable adjustment, assuming entitlement thereto were established, could not be measured by the total cost of purchasing and installing the structure. Indeed in his complaint, appellant claims an unspecified amount for being deprived of the use of his D-8 tractor and for being forced to rent a tractor equipped with ROPS.

<sup>3</sup> This concession was made because standards (29 CFR 1926.1000) issued by the Secretary of Labor pursuant to the Contract Work Hours and Safety Standards Act (40 U.S.C. § 327 *et seq.*) do not require ROPS on machines manufactured prior to July 1, 1969. Standards issued under the Contract Work Hours and Safety Standards Act have been adopted (29 CFR 1910.12) as standards under the Occupational Safety and Health Act (29 U.S.C. § 651 *et seq.*). This action was in accordance with the statute (29 U.S.C. § 653 (b) (2)).

February 24, 1976

in determining the minimum needs of the Government, is free to impose safety requirements more stringent than OSHA standards which are merely minimums, and that in any event the Government is entitled to strict compliance with the specifications.

Considering the Government's penultimate argument first, the statutory language (29 U.S.C. § 653(b) (2)) that:

\*\*\* safety and health standards promulgated under (listed Acts, including the Contract Work Hours and Safety Standards Act) are superseded on the effective date of corresponding standards, promulgated under this chapter, which are determined by the Secretary to be more effective \*\*\*

casts substantial doubt on the validity of the assertion that OSHA standards were intended to be minimums at least insofar as the standards are applicable to the conditions under which Federal contracts are performed.<sup>4</sup> Be that as it may, the instant contract being for con-

struction and there being no doubt that OSHA was not intended to and did not repeal the Contract Work Hours and Safety Standards Act,<sup>5</sup> the interesting questions raised by sec. 4(b)(1) of OSHA<sup>6</sup> are not present here.<sup>7</sup> The Contract Work Hours and Safety Standards Act was originally enacted as the Contract Work Hours Act of 1962<sup>8</sup> and amended to its present title and to

<sup>5</sup> There is no express repeal in OSHA and the legislative history (Senate Report No. 91-1282, note 4, *supra*, at 5199) provides in pertinent part:

"It is the intent of the committee that the Secretary will develop health and safety standards for construction workers covered by Public Law 91-54 (Contract Work Hours and Safety Standards Act) pursuant to the provisions of that law and that the Secretary will utilize the same mechanisms and resources for the development of health and safety standards for other construction workers newly covered by this Act."

<sup>6</sup> OSHA provides in part:

"(b) (1) Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies and State agencies acting under section 2021 of Title 42, exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. § 653(b) (1).

<sup>7</sup> This is so because of the Contract Work Hours and Safety Standards Act contains no corresponding exemption as that quoted (note 6, *supra*) from OSHA. *Cf. Gearhart-Owen Industries, Inc.*, OSHRC Docket No. 4263 (February 21, 1975), 1974-1975 Occupational & Health Decisions (CCH) par. 19,329 (fact that DOD had promulgated safety regulations, which were required by an ASPR clause to be incorporated by reference into the contract, relative to the manufacture of explosives and dangerous materials, did not preclude the Secretary of Labor's jurisdiction under OSHA since the 4(b)(1) exemption (note 6, *supra*), was held, with one Commissioner dissenting, to be applicable only where the purpose of the statutory authority exercised by the Federal agency concerned was to affect occupational safety and health).

<sup>8</sup> Public Law 87-581, Aug. 13, 1962, 76 Stat. 357.

<sup>4</sup> The Government's citation of certain provisions of the statute providing that state plans for the development and enforcement of occupational and health standards be at least as effective as standards promulgated under OSHA (29 U.S.C. § 667), and of the legislative history (Senate Report No. 91-1282, U.S. Code Congressional and Administrative News, 91st Congress, Second Session at 5182), relating to the adoption of consensus standards is not persuasive. Deferring to state plans which are at least as effective as standards promulgated under OSHA is not indicative of an intent to allow similar latitude to Federal agencies and we note that the statute relating to consensus standards or established Federal standards which are to be promulgated within 2 years after enactment (29 U.S.C. § 655(a)), provides that in case of conflict the standard which assures the greatest protection shall be promulgated.

include provisions (40 U.S.C. § 327 *et seq.*) applicable to health and safety standards in 1969.<sup>9</sup> Federal Procurement Regulations, which are issued under the Federal Property and Administrative Services Act of 1949 and have been held to have the force and effect of law<sup>10</sup> have long included a provision that in preparing invitations for bids for construction there shall be included to the extent applicable "(xi) Safety requirements \* \* \*."<sup>11</sup> We, therefore, conclude that the Contract Work Hours and Safety Standards Act is not to be construed as preempting the authority of Federal agencies to prescribe safety requirements in contracts awarded by such agencies.

If, for example, the instant contract was to be performed on highly uneven terrain or on steep slopes, it would seem anomalous indeed that the contracting officer would be precluded from prescribing ROPS on all material handling equipment used in contract performance.

The foregoing analysis suggests that appellant's contention that OSHA standards, which, as we have seen, are also standards under the Contract Work Hours and Safety

Standards Act, preclude the imposition of more stringent safety requirements in Federal construction contracts is erroneous.<sup>12</sup> Even if our conclusion were otherwise, it would not necessarily follow that the more stringent provisions would be unenforceable.<sup>13</sup> However, since we conclude that appellant's remedy for an alleged illegal clause, no less than its remedy for alleged restrictive specifications,<sup>14</sup> lies by protest in other forums prior to bidding and award, we find it unnecessary to decide whether the ROPS requirement was contrary to law. The Government being entitled to strict compliance with the specifications,<sup>15</sup> the contracting officer's decision to

<sup>12</sup> We note that the Secretary of Labor has determined (29 CFR 1926.2) that variances under the Contract Work Hours and Safety Standards Act may be granted under the same circumstances in which variances may be granted from OSHA standards and that the latter statute (29 U.S.C. § 655) prescribes the procedures under which an employer may apply for a variance. While a contractual safety requirement less than that prescribed by the Secretary of Labor would not, absent a variance, preclude enforcement by the Secretary of the higher standard, we can find no indication that the statute was intended to preclude Federal agencies from prescribing more stringent safety requirements in contracts awarded by them.

<sup>13</sup> See, e.g., *Rough Diamond Company v. United States*, 173 Ct. Cl. 15 (1965) (plaintiffs could obtain no litigable rights under statute not enacted for their benefit). *Of. General American Transportation Corp., General Research Division*, PSBCA No. 67 (November 12, 1974), 74-2 BCA par. 10,935 at 52,047 (Christian doctrine, note 10, *supra*, has never been applied to excise from the contract special clauses agreed to by the parties).

<sup>14</sup> *J. D. Piercey*, IBCA-1013-12-73 (Oct. 17, 1975), 75-2 BCA par. 11,533.

<sup>15</sup> *J. D. Piercey*, note 14, *supra*, and cases cited.

<sup>9</sup> Public Law 91-54, Aug. 9, 1969, 83 Stat. 96. Regulations implementing this law were issued in 1971. (See CCH, *Employment Safety & Health Guide* par. 7701.)

<sup>10</sup> See, e.g., *Herbert Schoenbrod, et al. v. United States*, 187 Ct. Cl. 627 (1969). *Of. G. L. Christian and Associates v. United States*, 160 Ct. Cl. 1 (1963), on rehearing, *id.* at 58.

<sup>11</sup> See FPR 1-18.203-1 as issued in FPR Amendment 48, Sept. 1968 and 41 CFR 1-18.203-1 (1975).

## CITY OF KLAUOCK v. STATE OF ALASKA

## DEPARTMENT OF HIGHWAYS

February 25, 1976

enforce the ROPS requirement was proper.

*Conclusion*

The appeal is denied.

SPENCER T. NISSEN,  
*Administrative Judge.*

I CONCUR:

WILLIAM F. MCGRAW,  
*Chief Administrative Judge.*

CITY OF KLAUOCK

v.

P. H. ANDREW, ET AL.

CITY OF KLAUOCK

v.

STATE OF ALASKA  
DEPARTMENT OF HIGH-  
WAYS

24 IBLA 85

Decided February 25, 1976

Appeals from decisions of the Alaska townsite trustee, Bureau of Land Management, awarding townsite lot deeds to respondents, and rejecting appellant's conflicting townsite lot application.

Affirmed.

### 1. Alaska: Townsites—Rules of Practice: Appeals: Standing To Appeal

A city organized under Alaska State law has standing to appeal from the rejection of its application for townsite deeds to land within its city limits, and the

awarding of deeds to occupants of the townsite lots at the time of final subdivisional survey.

### 2. Alaska: Townsites—Regulations: Applicability

To the extent they do not vitiate the purposes or provisions of the Alaska Native townsite law, the provisions of the non-Native Alaska townsite law are to be applied in the disposition of Native townsite lands; in such cases, references to the Act of Mar. 3, 1891, 43 U.S.C. § 732 (1970), in the documents relating to a Native townsite are not *pro forma*, and the non-Native townsite provisions may be applied.

### 3. Alaska: Townsites—Townsites

The date determinative of the rights of occupants of Alaska Native townsite land is the date of final subdivisional survey, not the date of patent; if, at the date of final subdivisional survey, the lots are occupied by non-Natives as well as Natives, the lots will be disposed of under both the non-Native and Native townsite provisions.

### 4. Alaska: Townsites

The Alaska townsite trustee's lot awards will not be disturbed when the appellant challenging the awards fails to assert facts that might demonstrate error in the application of the Alaska townsite rules: (1) that, in the absence of conflicting occupants on the same parcel, occupancy of a portion of a lot is occupancy of the whole lot; (2) that occupancy may be established by *the initiation of settlement* if the intent to possess and improve is clearly evidenced on the ground; and (3) that lots will be awarded to those who occupy or *are entitled to occupancy* of the lots at issue.

APPEARANCES: Robert G. Mullen-dore, Esq., of Roberts, Shefelman, Law-

rence, Gay & Moch, Seattle, Washington, for appellant; Ray C. Preston, Esq., Assistant Attorney General, State of Alaska, for State of Alaska Department of Highways; Louis M. and Josephine Seltzer, Martin J. Fabry III, Paul H. and Betty W. Breed, and DeMorrow and Nelda C. Lynch, pro se, and Ralph Burnett, President, Prince of Wales Lodge, Inc.

**OPINION BY ADMINISTRATIVE JUDGE FISHMAN**

**INTERIOR BOARD OF  
LAND APPEALS**

The City of Klawock, Alaska, has appealed from separate decisions of the Alaska townsite trustee rejecting the City's application for various lots in the Klawock Townsite Addition, and granting the conflicting applications of the respondent parties (see Appendix, p. 57). In each decision the townsite trustee recited that the plat of dependent resurvey and subdivision of a portion of U.S. Survey No. 1569, containing the parcels at issue, was approved July 30, 1974, and that he found each lot at issue to be improved as described in each respondent's application on the date of the lot awards, Dec. 11, 1974. The trustee held that non-Natives occupying lots in a Native townsite at the time of approval of the subdivisional plat of survey were entitled to deeds to the lots they occupied.

On appeal, the City of Klawock argues that the only persons entitled to a trustee's deed for land in a Native townsite are those who oc-

cupied lots at the date of patent to the trustee, and that the only proper disposition of lands unoccupied at the time of patent is to the City of Klawock itself. In the alternative, the City argues in its reply brief that if the date of final subdivisional survey can be used to determine occupants' rights, only *Native* occupants can acquire rights by occupancy at that date.

Klawock Townsite was established by Executive Order No. 4712 (Aug. 30, 1927), which excluded approximately 195 acres of land from Tongass National Forest and "reserved [it] to be disposed of for townsite purposes as provided by Sec. 11 of the act of March 3, 1891 (26 Stat., 1095), and the act of May 25, 1926 (44 Stat., 629)."

Sec. 11 of the Act of Mar. 3, 1891, 26 Stat. 1099, 43 U.S.C. § 732 (1970), provided for the entry of Alaska lands as townsites for the benefit of the occupants thereof, to be disposed of in a manner generally consistent with the townsite provisions applicable in the lower 48 states, 43 U.S.C. § 718 *et seq.* (1970). The Act of May 25, 1926, 44 Stat. 629, 630, 43 U.S.C. §§ 733-736 (1970), provided, *inter alia*, that land occupied by Alaska Natives as a townsite could be surveyed, patented and deeded to the occupants thereof.

In *Solicitor's Opinion*, 66 I.D. 212 (1959) (hereinafter *Sawman Townsite*), the Deputy Solicitor held that the townsite trustee should not charge purchase money or survey fees in the deeding of lots to Na-

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## DEPARTMENT OF HIGHWAYS

February 25, 1976

tives in Saxman townsite. The holding was based on the Solicitor's finding that, since Saxman qualified as a Native townsite under the 1926 Act, the reference in the patent to the trustee to both the 1891 Act, *supra* and the 1926 Act, *supra*, was *pro forma* only, and was not intended to impose any of the 1891 Act requirements, including purchase money or survey fees, on the disposition of lots in Saxman townsite. *Saxman Townsite, supra* at 214.

Appellant argues that the reference to the 1891 Act, the so-called non-Native townsite provisions, in the Klawock patent was similarly *pro forma*, and that the lots are to be disposed of only in conformity with the 1926 Act. If so, the City argues, 43 CFR 2565.3(c), which provides that in a non-Native townsite, " \* \* \* Only those who were occupants of lots \* \* \* at the date of the approval of final subdivisional town site survey \* \* \* are entitled to the allotments herein provided," cannot be applied to Klawock. Instead, according to the City, the trustee should follow the cases under the townsite laws applicable to the lower 48 states (43 U.S.C. § 718 *et seq.* (1970)), and hold that the only occupants entitled to deeds are those who occupied their lots at the time of patent to the trustee.

[1] In response to the City's contentions, the State of Alaska, Department of Highways (hereinafter the State), applicant for Lot 6,

Block 65 and respondent in IBLA 76-52, argues as an initial matter that the City of Klawock's appeal should be dismissed because the City has no standing to raise the claim made on appeal. Regulation 43 CFR 4.410 provides in part that " \* \* \* any party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management \* \* \* shall have a right to appeal to the Board." As the City is a conflicting applicant, asserting rights under 43 CFR 2565.7, *inter alia*, for a deed to the parcel awarded to the State of Alaska, we are hard put to understand how it is not adversely affected by the decision appealed from.

However, the State proceeds to argue: (1) that the City as an applicant could only take as trustee for the benefit of its citizens (43 CFR 2565.5(b)(1), 2565.7), and thus the townspeople of Klawock are the real parties in interest; and (2) that a City organized under the laws of the State of Alaska (AS 18.80.255) violates its charter when it represents a racial or ethnic group against another such group. First, a holder (or potential holder) of a legal title in trust is adversely affected by a decision rejecting its claim to the title asserted, just as the beneficiaries are adversely affected. 76 AM. JUR. 2d *Trusts* § 600 (1970). Second, whether or not the City has an impermissible motive for appealing is not at issue—whether or not the occupant of a

lot at the time of final subdivisional survey has a superior right to that lot is at issue. The City was adversely affected by the decision below, and we hold it has standing in IBLA 76-52. 43 CFR 4.410. Since the City has appealed from the decisions of the trustee rejecting its application for deeds to the remaining lots in issue, the City clearly has standing to appear as to those decisions as well.

On the merits of the case, the State argues that the townsite trustee correctly cited and applied 43 CFR 2564.3, which provides:

Native towns which are occupied partly by white lot occupants will be surveyed and disposed of under the provisions of both the act of March 3, 1891 \* \* \*, and the act of May 25, 1926 \* \* \*.

The State points out that the City seeks to benefit from some of the non-Native townsite regulations, (e.g., 43 CFR 2565.7, which provides for the conveyance of undeeded lands to the municipality), while asserting that the rest are inapplicable, especially 43 CFR 2565.3 (c). The State also argues that the cases cited by the City, for the proposition that only settlers at the time of entry and patent to the trustee are entitled to deeds, all deal with the substantially different townsite provisions applying to the lower 48 states, 43 U.S.C. § 718 *et seq.* (1970). Further, the State points to the general grant of authority to the Native townsite trustee, 43 CFR 80.22 (1938), now 43 CFR 2564.0-4(b) (1975), as support for the trustee's action in awarding it the lot for which it appealed.

The individual parties respondent in IBLA 75-301 separately indicate their reliance on the townsite trustee's assurances about how the unsurveyed portion of the townsite would be disposed of, and various City Council actions, especially a resolution of May 9, 1973, endorsing the trustee's proposal for lot distribution and authorizing respondents' occupancy and improvements. Martin J. Fabry, III, based on his experience as a member of the Klawock City Council, indicates that until after the respondents had begun constructing their improvements the City's practice was to stake and post whatever vacant townsite land it claimed and felt it needed.<sup>1</sup> In addition, respondents individually attack appellant's characterization of awards to non-Natives as an invitation to speculation and a destruction of Native "cultural integrity," arguing that they are permanent residents, not speculators, and provide essential services to the community.

The individual respondents rely on a roughly phrased claim that the City, after approving of or authorizing their staking and improving the lots at issue, is estopped to appeal the award to them. Similarly, the State in its counter-reply, and some of the individual respondents, assert that the United States can-

<sup>1</sup> Ralph Burnett, President of respondent corporation, Prince of Wales Lodge, Inc., submitted with his answer a copy of a Notice, dated Aug. 30, 1974, from the City of Klawock indicating that the BLM had approved the subdivisional survey of townsite, and that the townsite lands were *henceforth* not subject to staking by non-Natives.

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not renege on the townsite trustee's assurances that they could enter on and improve the lots at issue. (*But see* 43 CFR 1810.3.) It is unnecessary for us to rule on the merits of these claims because, for the following reasons, we hold that the trustee's awards were proper, and the City's application for the lots at issue was properly rejected.

[2] The Native townsite regulations provided at the time Klawock townsite was patented, and now provide, that the townsite trustee "will take such action as may be necessary to accomplish the objects sought to be accomplished by [section 3 of the Act of May 25, 1926]." 43 CFR 80.22 (1938), now 43 CFR 2564.0-4(b) (1975). As construed in *Saxman Townsite, supra*, the statute requires the trustee to administer his trust so that the provisions of the 1926 Act, and the regulations issued thereunder, are not vitiated by the application of 1891 Act provisions. Thus, the Deputy Solicitor held in *Saxman* that the non-Native townsite purchase and survey charges should not be imposed in a Native townsite governed by 43 CFR 80.22 (1952), now 43 CFR 2564.2 (1975).

The discretion granted the trustee, however, authorizes him to apply the general regulations under the non-Native townsite law when these do not conflict with the 1926 Act. In such situations, the reference in the Executive Order withdrawal and patent to both the 1891

Act and the 1926 Act is not *pro forma*, as in *Saxman*, and the 1891 Act provisions and regulations may be applied.

[3] As the Deputy Solicitor indicated in *Saxman*, there are no specific Native townsite regulations governing the disposal of additional lots and lots unoccupied at the time of reservation and patent. We hold that the townsite trustee thus properly invoked 43 CFR 2565.3,<sup>2</sup> providing for the award of lots to those who occupy them "at the date of final subdivisional townsite survey," which applies to both classes of Alaska townsites, and which in no way vitiates the provisions of the 1926 Act.

In determining occupancy at the date of final subdivisional survey, the trustee properly invoked the provisions of 43 CFR 2564.3, which provide that Native towns partly occupied by non-Native lot occupants will be surveyed and disposed of under the provisions of both the 1891 and the 1926 Acts. 43 CFR 2564.3 (1975), formerly 43 CFR 80.26 (1938), codifying Circular No. 491, Native Towns, para. 7 (Feb. 24, 1928).<sup>3</sup>

<sup>2</sup> 43 CFR 2565.3 (1975), formerly 43 CFR 80.11 (1938), codifying Circular No. 491, as revised Feb. 24, 1928, was in effect at the time of E.O. No. 4712 establishing the Klawock townsite reservation.

<sup>3</sup> To the extent that the trustee's discretion is guided by the applicable portions of the Bureau of Land Management Manual, we note that its provisions accord with this construction of the Native and non-Native townsite laws. The Manual provisions uniformly use the date of final subdivisional survey as the

(Continued)

Appellant makes three arguments to support its conclusion that the time of patent, rather than the date of final subdivisional survey, controls lot awards. First, appellant argues that *Saxman Townsite, supra*, held that references to the 1891 Act in Native townsite transactions were *pro forma*, and thus the townsite provisions of the lower 48 states apply. Since we construe *Saxman* to have held only that reference to the 1891 Act is *pro forma* in situations where the 1926 Act controls the manner of executing the trust, this argument fails.

Second, in its reply brief, appellant relies heavily on the argument that the Alaska townsite provisions themselves require that the provisions of the general townsite law, 43 U.S.C. § 718 *et seq.* (1970), govern the date for determining occupancy rights in a Native townsite. Both sec. 11 of the 1891 Act, 43 U.S.C. § 732 (1970), and sec. 4 of the 1926 Act, 43 U.S.C. § 736 (1970), however, authorize the Secretary to promulgate regulations to administer these laws. The regulations applied by the townsite trustee, 43 CFR 2564.3 (Native towns occupied partly by non-Native lot occupants) and 43 CFR 2565.3 (occupancy to be determined at date of final subdivisional survey), were both promul-

gated pursuant to these grants of authority.

The application of these regulations, especially 43 CFR 2565.3, in a Native townsite would, according to appellant, violate the provision in 43 U.S.C. § 732 (1970), that the Secretary conform his regulations to the intent of the general townsite law in order to achieve as nearly the same results as possible. We do not feel that the regulations as construed above violate this provision: unlike the general townsite law, the provisions of the Alaska townsite statutes require the Secretary to administer the trust subsequent to entry, reservation or patent. The regulation attacked by appellant was promulgated to govern the trustee in executing this portion of the trust as the county judge would have under state or territorial legislation in the lower 48 states. Regulations governing execution of the trust subsequent to entry or patent, including 43 CFR 2565.3, were thus essential under the Alaska townsite laws. The regulations under the 1891 Act control this case, rather than the townsite cases from the lower 48 states cited for the proposition that the date of entry or patent is determinative of rights.<sup>4</sup>

(Continued)  
"critical date" for determining occupancy. *E.g.*, V. BLM Manual Ch. 2A.8.2, 2A.8.17G. The Manual also provides for the application of provisions of both townsite laws in conjunction when necessary. "All townsite patents for trustees are issued under the authority of the Acts of 1891 and 1926 so that both white and native persons may be accommodated by the Trustee as circumstances warrant." V BLM Manual Ch. 2A.8.14.

<sup>4</sup> Appellant cites *Hodges v. Lemp*, 135 P. 250 (Idaho 1913); *Scully v. Squier*, 13 Idaho 417, 90 P. 573 (1907); *Holland v. Buchanan*, 19 Utah 11, 56 P. 561 (1899); *Newhouse v. Simino*, 29 P. 263, 264 (Wash. 1892). These cases are inapposite in this situation because under the general townsite laws, 43 U.S.C. § 718 *et seq.* (1970), all title passed from the United States upon patent to the trustee, usually the county judge, at which time the "pre-emption" right granted by the federal statute terminated and state law governed further disposition of the land. 43 U.S.C. § 718

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Third, appellant argues that the time of subdivisional survey, as established by 43 CFR 2565.3(c), "is especially unsuitable to native townsites, however, since the time of final subdivisional survey is so arbitrary that it is no standard at all." We find nothing arbitrary in the use of the subdivisional survey date. Application of the regulation vitiates no provision of the 1926 Act and its regulations; Natives could establish rights to unsurveyed townsite lands in this same manner. Nor does the delay in final subdivision of the unoccupied portion of the townsite render the survey date an "extraneous factor." Patent issued to the Klawock trustee 14 years after the townsite was established, a delay which would, if appellant's argument were accepted, deny the significance of the patent date as well.

As *Saxman Townsite*, *supra*, at 214-15, indicated, the failure to survey and lot *unoccupied* lands in a Native townsite was well justified by the prevailing uncertainty about the manner in which they might be disposed. Indeed, the regulations during the period at issue provided that the survey of *occupied* Native townsite lands would be ordered by the Commissioner of the General Land Office (now the Director, Bureau of Land Management) only on a report from the townsite trustee showing that it would be in the best in-

terests of the Native occupants to have the lots platted, and streets and alleys set aside. Circular No. 1082, 51 L.D. 501, 503 (1926).

The second thesis of the City's appeal is that the City is entitled to all lots in the townsite unoccupied at the time of patent. For the reasons stated above, the awards to the occupants of the lots at the time of final subdivisional survey were proper. On the record before us the City established no conflicting claim to any of the lots at issue by staking or improvement prior to the date of final subdivisional survey, so that the rejection of the City's application therefor is affirmed. It is thus unnecessary to examine the merits of appellant's argument that the regulations authorize and/or require the conveyance to the City of the Native townsite lots unoccupied at the time of patent. It is further unnecessary in these cases to examine the merits of the City's claim as it may apply to lots unoccupied at the time of final subdivisional survey.<sup>5</sup>

<sup>5</sup> The State of Alaska notes that the City's claim to deeds for such lands depends on the application of non-Native townsite regulations, *viz.*, 43 CFR 2565.5(b) and 43 CFR 2565.7, to this Native townsite, the same proposition which the City could not countenance with respect to the regulation governing the date determinative of occupants' rights. We reiterate that the non-Native townsite regulations may be applied, and the reference to the 1891 Act is not *pro forma*, where the provisions will do no violence to the purposes and provisions of the Native townsite law. The City may have a claim to title to all unoccupied lands, but occupancy must be determined as of the date of final subdivisional survey.

(1970). In Alaska, however, the United States remains titleholder as trustee, and the disposition of the land subsequent to patent is governed by federal law and regulation.

The City further argues that the Act of 1926 was intended solely for the benefit of Natives, and that only Natives may acquire lands by occupancy within a Native townsite. The regulations of the Department of the Interior under the 1926 Act have always provided to the contrary. 43 CFR 80.26 (1938), codifying Circular No. 491, Native Towns, para. 7 (Feb. 24, 1928) (found in Circulars and Regulations of the General Land Office, 1930 ed., at 270-71), now 43 CFR 2564.3 (1975). We are not free to ignore these provisions. See *Arizona Public Service Co.*, 20 IBLA 120, 123 (1975); see also *Chapman v. Sheridan-Wyoming Coal Co., Inc.*, 338 U.S. 621, 629 (1950); *McKay v. Wahlenmaier*, 226 F. 2d 35, 43 (D.C. Cir. 1955).

In the same vein, the City argues in its reply brief that if rights can be accrued by occupancy subsequent to patent in a Native townsite, only Natives can acquire such rights. In support of this argument, appellant cites the legislative history of the Act of Aug. 14, 1964, 78 Stat. 438, which provided for the disposition of the unoccupied lots remaining in the townsite of Saxman, Alaska. The cited material, H. R. Rep. No. 1247, 88th Cong., 2d Sess. (1964), states that the unoccupied lands in the townsite are held for the benefit of the Natives, but the material does not speak to the central issue here, i.e., when the determination of occupancy is to be made. The material

certainly does not purport to nullify the two regulations whose application appellant contests here, 43 CFR 2564.3 and 43 CFR 2565.3(c).

In fact, the Act of Aug. 14, 1964, 78 Stat. 438, better supports the construction of the Alaska townsite law applied in this decision. The Act provides that the trustee may convey to the City of Saxman all lands " \* \* which on the date of enactment of this Act are unoccupied \* \* ," indicating that the date of patent did not terminate the acquisition of rights by occupation, and indicating no limitation on who might qualify by occupation.<sup>6</sup>

Appellant also objects to the failure of the Department to have promulgated rules as recommended by the Deputy Solicitor in *Saxman Townsite*, *supra* at 215. The City argues that the non-Native townsite regulations cannot be expanded to apply to Native townsites by adjudication, and that the Department must first go through rulemaking under sec. 4 of the Administrative Procedure Act, *as amended*, 5 U.S.C. § 553 (1970). We do not find that the Department created new rules with the construction of the townsite regulations in this case.

The City argues that "the authority to dispose of unoccupied native

<sup>6</sup> We reject the City's argument as a matter of statutory and regulatory interpretation, without reaching the State's assertion that the City's construction of the townsite law would violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution.

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townsite lands must be lawfully ruled into existence before it can be delegated to a subordinate to be carried out." Reply Brief at 17. However, the authority to "dispose" of such lands has always existed. As *Sawman Townsite, supra*, and H. R. Rep. No. 1247, 88th Cong., 2d Sess. (1964), accompanying the Act of Aug. 14, 1964, both pointed out, the authority the trustee lacked was the authority to *sell* unoccupied Native townsite lands. Contrary to appellant, the legislative history of the Act of Aug. 14, 1964, 78 Stat. 438, recognized that the trustee had the authority to hold the lands open to occupancy subsequent to patent. H. R. Rep. No. 1247, 88th Cong., 2d Sess. (1964).

To the extent that this case "fills the void" in the townsite regulations, however, we note that the Supreme Court has held that the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (1970), does not compel agencies with rulemaking authority to engage therein, nor does it prescribe, in any sense relevant here, when adjudication is improper. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 290-95 (1974). "[T]he choice between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." *Securities & Exchange Comm. v. Chenery*

*Corp.*, 332 U.S. 194, 203 (1947). We reject appellant's contention that the trustee's decision violated the Administrative Procedure Act or due process in this regard.

[4] The City filed a supplemental notice of appeal and statement of reasons challenging the lot awards to some of the individual respondents on factual grounds. First, it argues that the lots awarded to the Breeds, the Fabrys and Prince of Wales Lodge, Inc., are too large to be considered occupied by these respondents. Except where separate parties simultaneously occupy different portions of the same lot, it has been the rule of the Department that occupancy of a portion of a townsite lot constitutes occupancy of the whole lot. *See Mary M. Tweet*, A-28417 (Nov. 16, 1960). Appellant's argument appears to be a challenge to the lotting in the survey, the accuracy and propriety of which is not before us.

Second, appellant argues that the improvements on Block 64, Lot 8 of P. H. and Victoria Lee Andrew are insufficient to justify a claim of occupancy, and that "some or all" of the Andrews' improvements and those of Paul H. and Betty W. Breed were made subsequent to approval of the final subdivisional survey on July 30, 1974. In *Sawyer v. Van Hook*, 1 Alas. 108 (1900), the Court, in resolving conflicting

claims to the same townsite lot, recited that the prior and superior claim to a townsite lot is established by settlement and improvement, *or the initiation of such settlement*. It held that residence need not be established, but that the clear and unmistakable intention to possess and improve must be evidenced on the ground. The Court found that the plaintiff's staking and depositing building materials on the lot at the time of determination established his right to the lot.

The Andrews' application asserts that they staked the property in June 1973 and started construction in May 1974. At the time of their Dec. 1974 application the property contained a 12' by 16' log-foundation, wood-frame cabin. The Breeds' application does not detail construction and completion dates, but they assert that they staked the land soon after Apr. 1973 and then commenced clearing the lot. At the time of their Dec. 1974 application, the lot contained a 24' by 48' house, a 16' by 12' building, a septic tank, and aircraft mooring facilities including a road, airplane ramp and hangar foundation. Appellant does not challenge these assertions or the trustee's findings that the improvements existed as alleged on the date of lot awards, but argues that the assertions do not legally support a finding of occupancy. We hold that the assertions on both applications meet the test of *Sawyer v. Van Hook*, *supra*, and demonstrate, if not actual residence and finished im-

provements, the clear intent to possess and improve the parcels involved which constitutes occupancy under the townsite law.

Third, appellant argues that the lots awarded to the Andrews, the Seltzers, and James W. Paul "were occupied, if at all, by persons other than the named adverse part[ies]." 43 CFR 2565.3(c) provides in pertinent part that lot awards are to be made only to " \* \* \* those who were occupants of lots *or entitled to such occupancy* at the date of the approval of final subdivisional townsite survey \* \* \*." (*Italics added.*) Appellant has not submitted anything to support a conclusion that the respondents did not fit within the alternative regulatory provision, or that these unspecified other persons claim adversely to respondents. *See Mike Agbaba, A-28372 (Aug. 5, 1960).*

By motion filed Aug. 6, 1975, appellant requested oral argument in this case. Appellant argues that the "novel and far-reaching" issues in this case would be better resolved after oral argument. Respondents, noting the impossibility of their attendance elsewhere, requested that such oral argument take place in Klawock, or not at all. Respondents appeared to envision the oral argument as a hearing allowing the Board to "hear as well from the Natives who support non-Natives remaining on our land." In the exercise of the discretion granted this Board, 43 CFR 4.25, we deny the

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motion: first and foremost because we do not feel our understanding would be so advanced by oral argument after the able briefs of the parties; and second because argument outside of Alaska would be manifestly unfair to the individual respondents.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of

the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

FREDERICK FISHMAN,  
*Administrative Judge.*

WE CONCUR:

EDWARD W. STUEBING,  
*Administrative Judge.*

ANNE POINDEXTER LEWIS,  
*Administrative Judge.*

## APPENDIX

Respondents	Block	Lot
(IBLA 75-301)		
P. H. and Victoria Lee Andrew-----	64	8
Paul H. and Betty W. Breed-----	67	6
Prince of Wales Lodge, Inc-----	67	3
Amelia J. Dilworth, Donald L. Safford-----	67	2
Martin J., III, and Verne L. Fabry-----	67	5
James W. Paul-----	65	7
Bryan H. and Faith L. Robbins-----	67	4
Louis M. and Josephine G. Seltzer-----	64	11
(IBLA 76-52)		
State of Alaska, Department of Highways-----	65	6

*March 2, 1976*

**STEVE SHAPIRO**  
v.  
**BISHOP COAL COMPANY**

6 IBMA 28

*Decided March 2, 1976*

Cross appeals by Bishop Coal Company and Steve Shapiro from a decision by Administrative Law Judge James A. Broderick in Docket No. HOPE 75-706 with respect to an application for review of an alleged discriminatory discharge under sec. 110 (b)(1) of the Federal Coal Mine Health and Safety Act of 1969.

Affirmed in result and remanded.

**1. Federal Coal Mine Health and Safety Act of 1969: Entitlement of Miners: Discharge: Legitimate Cause**

Where an operator asserts and establishes a legitimate cause for discharge, the applicant for review must show by affirmative and persuasive evidence that the invocation of such cause was a pretext for an unlawful motive in order to show a violation of sec. 110(b)(1). 30 U.S.C. § 820(b)(1) (1970).

**2. Federal Coal Mine Health and Safety Act of 1969: Entitlement of Miners: Discrimination: Hearings: Pleading**

Where an applicant for review seeks relief only for an allegedly discriminatory discharge, an allegation to the effect that an act which preceded such discharge was discriminatory states a conclusion of law which is mere surplusage. 30 U.S.C. § 820(b)(2) (1970). 43 CFR 4.562(d).

**3. Federal Coal Mine Health and Safety Act of 1969: Entitlement of Miners: Discharge: Generally**

In order to conclude that a discharge occurs " \* \* \* by reason of the fact that \* \* \*" a miner has engaged in protected reporting activities, an Administrative Law Judge must find that such discharge would not have occurred but for such activities. 30 U.S.C. § 820(b)(1)(A) (1970).

**APPEARANCES:** Daniel L. Stickler, Esq., for appellant, Bishop Coal Company; James M. Haviland, Esq., for cross appellant, Steve Shapiro.

*OPINION BY ALTERNATE  
ADMINISTRATIVE JUDGE  
TORBETT*

*INTERIOR BOARD OF MINE  
OPERATIONS APPEALS*

By decision dated June 27, 1975, in Docket No. HOPE 75-706, Administrative Law Judge James A. Broderick granted Steve Shapiro (Applicant) relief from a discharge by Bishop Coal Company (Respondent) on the ground that the motivation in part for such discharge was illegal retaliation for reporting activities protected by sec. 110(b)(1)(A) of the Federal Coal Mine Health and Safety Act of 1969. 30 U.S.C. § 820(b)(1)(A) (1970).<sup>1</sup> More specifically, Judge

<sup>1</sup> Sec. 110(b)(1) of the Act reads as follows:

"(b)(1) No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such

Broderick ordered *inter alia*: (1) that within 30 days Applicant be reinstated with the same seniority and other employment rights that he would have had if he had not been discharged; (2) that within 30 days he receive back wages with 6 percent interest less any wages earned from other employment; and (3) that he be reimbursed for the reasonable costs and expenses of litigation. He also directed that counsel confer and attempt to agree as to the amount of the compensation now due, with the proviso, that upon a failure to agree, he would take such further action as was appropriate in the circumstances. The effect of that direction was stayed pending the outcome of review by the Board. 43 CFR 4.594.

Both Respondent and Applicant have appealed from the decision below, contending that the Judge made critical errors in his findings of fact and conclusions of law. For the reasons set forth in detail hereinafter, we find ultimately that Shapiro would not have been discharged solely but for his protected reporting activities, and on this basis, we are affirming Judge Brod-

miner or representative (A) has notified the Secretary or his authorized representative of any alleged violation or danger, (B) has filed, instituted, or caused to be filed or instituted any proceeding under this Act, or (C) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this Act." [Italics added.]

Applicant has *not* claimed that he was discharged by reason of activities protected by clauses (B) or (C) of the above-quoted section and no issue concerning the construction and application of these clauses is presented by this case.

erick's result, 43 CFR 4.605, and remanding for completion of unsettled remedial matters.

## I.

### *Procedural and Factual*

#### *Background*

Applicant was employed at Respondent's Bishop Mine which is located in the State of West Virginia. He was classified as a face-man and held the job title of scoop operator. He was hired on or about June 2, 1971, and was continuously in the employ of Respondent until his disputed discharge (Tr. 11-12).

Applicant is a member of Local 6025, United Mine Workers of America, which represents the employees of the Bishop Mine. From June of 1973 until the date of discharge, he served as an elected member of the Mine Health and Safety Committee of Local 6025 (Tr. 12).

Applicant did not work either Monday, Jan. 20, 1975, or Tuesday, Jan. 21, 1975 (Tr. 12). The former absence was due to his decision to spend an additional day at a weekend family reunion which took place in New Jersey. Although he was aware that he might well take this extra day before leaving for New Jersey, he did not seek from Respondent prior permission to do so (Tr. 61, Ex. 3). The additional day of absence was due to exhaustion on account of a weather-induced late return home from the reunion at 3 a.m. on Tuesday morning. As to this latter absence, Ap-

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plicant was precluded from notifying Respondent because his telephone was out of order (Tr. 61-63, Exs. 1-5).

On Jan. 23, 1975, Applicant was suspended subject to discharge. Exercising his rights under Article XXIV of the National Bituminous Coal Wage Agreement of 1974, the collective bargaining agreement covering the Bishop Mine (Ex. 24), hereinafter referred to as the Contract, Applicant timely requested a discharge hearing which was held on Jan. 27, 1975. At that hearing, the full explanation of Applicant's two consecutive absences, together with supporting evidence to substantiate his account of the circumstances, was made to Respondent (Ex. 20).

On Jan. 28, 1975, Respondent discharged Applicant for absenteeism, relying purportedly on Article XXII, Section (i) of the Contract.

Applicant instituted the above-captioned proceeding by filing an application for review pursuant to sec. 110(b)(2) of the Act on Feb. 14, 1975. 30 U.S.C. § 820(b)(2) (1970).<sup>2</sup> He asked for relief

from his discharge, claiming that it was the result of his complaints to authorized representatives of the Secretary regarding alleged violations and dangers at Respondent's mines. In pertinent part, the relief requested was reinstatement, back pay, accrued benefits under the Contract, and reimbursement for the costs and expenses of litigation.

Following an evidentiary hearing held on Apr. 9, 1975, Judge Broderick handed down his decision on June 27, 1975. Respondent filed a timely notice of appeal on July 17, 1975, and Applicant did likewise on the following day. 43 CFR 4.600.

On Aug. 4, 1975, Applicant applied to the Board for temporary relief, to wit, reinstatement during the pendency of the appeal. 43 CFR 4.570. By Memorandum Opinion and Order, dated Aug. 27, 1975, the

the request of any party to enable the parties to present information relating to such violation. The parties shall be given written notice of the time and place of the hearing at least five days prior to the hearing. Any such hearing shall be of record and shall be subject to sec. 554 of title 5 of the United States Code. Upon receiving the report of such investigation, the Secretary shall make findings of fact. If he finds that such violation did occur, he shall issue a decision, incorporating an order therein, requiring the person committing such violation to take such affirmative action to abate the violation as the Secretary deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner or representative of miners to his former position with back pay. If he finds that there was no such violation, he shall issue an order denying the application. Such order shall incorporate the Secretary's findings therein. Any order issued by the Secretary under this paragraph shall be subject to judicial review in accordance with sec. 106 of this Act. Violations by any person of paragraph (1) of this subsection shall be subject to the provisions of secs. 108 and 109(a) of this title."

<sup>2</sup> Sec. 110(b)(2) of the Act provides as follows:

"(2) Any miner or a representative of miners who believes that he has been discharged or otherwise discriminated against by any person in violation of paragraph (1) of this subsection may, within thirty days after such violation occurs, apply to the Secretary for a review of such alleged discharge or discrimination. A copy of the application shall be sent to such person who shall be the respondent. Upon receipt of such application, the Secretary shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing at

Board denied Applicant's application on the ground "\* \* \* that the time and effort required to determine if an adequate showing has been made for temporary relief would be more productively devoted to expedited consideration of the parties' respective appeals on the merits." Expedited oral argument was scheduled for Sept. 4, 1975, but was postponed at Applicant's request with the consent of Respondent.

Subsequent to the filing of the last of the reply briefs on Oct. 10, 1975, oral argument before the undersigned panel took place on Oct. 14, 1975.

On Dec. 11, 1975, Applicant filed a motion seeking remand for the purpose of reopening the evidentiary record for the taking of newly discovered evidence. According to affidavits supportive of the subject motion, the new evidence is testimony by Ms. Jeannette Childers, Business Manager for Wells Medical Services, Princeton, West Virginia, where Applicant's personal physician is in practice. Ms. Childers purportedly would testify that, sometime between Oct. 1974 and Dec. 4, 1975, she received a telephone call from an unidentified man claiming to speak for an unspecified coal company. This caller purportedly told her that Applicant would be seeking a doctor's excuse for an absence from work and that the coal company did not want such an excuse to be given.

A statement in opposition to Applicant's motion to remand was filed by Respondent on Dec. 22, 1975.

In as much as the date of the call, as well as the identity of the caller and his purported principal cannot be ascertained, the reliability and relevance of this vague evidence is so dubious that, even if deemed to be admissible and believable, such evidence could only have the most marginal probative value which we believe is insufficient to warrant further delay in processing this case. For this reason, the Board has decided to deny Applicant's motion.

## II.

### A.

#### *Issues Presented by Respondent's Appeal*

1. Whether the Administrative Law Judge erred in ultimately finding a retaliatory motivation proscribed by sec. 110(b)(1)(A) when the record allegedly shows that Applicant's discharge was for legitimate cause and such showing was not overcome by affirmative and persuasive evidence proving that its invocation was a pretext.

2. Whether the record contains sufficient evidence to sustain the Judge's finding that retaliation for protected reporting activities under sec. 110(b)(1)(A) was an underlying motivation for Applicant's discharge.

### B.

#### *Issues Presented by Applicant's Cross Appeal*

1. Whether the Administrative Law Judge erred in not finding that

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the assignment of Applicant to the allegedly undesirable task of cleaning sanding devices on man busses subsequent to his report to MESA of sandbox violations was an act of "discrimination" within the meaning of sec. 110(b) (1) of the Act.

2. Whether the Administrative Law Judge erred in not finding that Applicant's discharge was motivated exclusively by his complaints to MESA regarding alleged health and safety violations.

### III.

#### *Discussion*

#### A.

#### *Respondent's Appeal*

#### 1.

[1] Respondent contends that the record shows that Applicant's 2 consecutive days of unexcused absence furnished it legitimate cause under the Contract for discharge. In view of the alleged fact that legitimate cause existed, Respondent claims that the Judge could only have found that such cause was a pretext if Applicant had adduced affirmative and persuasive evidence that discredits the asserted motive. *See NLRB v. Patrick Plaza Dodge, Inc.*, 522 F. 2d 804, 807 (4th Cir. 1975), *NLRB v. Billen Shoe Co.*, 397 F. 2d 801, 803 (1st Cir. 1968), and *NLRB v. Ace Comb Co.*, 342 F. 2d 841 (8th Cir. 1965). Respondent insists that the record contains no such evidence, and that the Judge

erred by inferring an improper retaliatory underlying motive from evidence which, it is said, equally supports an inference that the underlying motive was legitimate or consists of contradicted self-serving or biased testimony.

Judge Broderick found that the 2 consecutive days of absence without prior permission or a doctor's excuse, which Respondent relies on as the underlying cause, was a precipitating factor or, in his words, "the proximate cause" of Applicant's discharge. However, he apparently did not believe that the 2-day absence was an underlying factor. Rather, he concluded that there were two other motivations for the discharge which were underlying, namely, that Applicant was not regarded as a satisfactory worker in general and that he had complained of safety violations and dangers repeatedly to the Secretary (Dec. 9). With regard to the 2-day absence, the Judge made no flat finding as to whether the facts of such absence constituted legitimate cause for discharge. He merely observed at page 11 of the decision that: "\* \* \* Respondent *apparently* had a lawful cause for discharge under the contract because of his work absences on January 20 and 21. \* \* \*." [Italics added.]

The appellate court cases from the First, the Fourth, and the Eighth Circuits cited *supra*, like the instant case, each involved a complaint charging a proscribed retaliatory discharge where the defense asserted was a single alleged legiti-

mate cause for discharge. *NLRB v. Billen Shoe, supra* (discharge for gross, public insubordination); *NLRB v. Patrick Plaza Dodge, Inc., supra* (discharge for deliberate production slow down); *NLRB v. Ace Comb Co., supra* (discharge for substandard performance after prior warning). In these cases, it was held that the complaining party can only preponderate if such party overcomes the defense of legitimate cause with affirmative and persuasive evidence that the discharge was really actuated by the forbidden motive. Purely circumstantial evidence pointing equally in either direction, uncorroborated self-serving statements of belief credited by the trier of fact, and evidence of anti-union animus were all held *not* to be affirmative and persuasive evidence. The rationale for the rule applied by these courts is that it provides adequate protection to an employee who is truly victimized for protected activities without immunizing him for all practical purposes from the consequences of conduct warranting discharge and without interfering with employer policies over discipline and the tenure of employment, the application of which is based upon motives which are *not* proscribed by the general labor law.

We recognize that the above-cited circuit court cases, which have been argued by both parties, were decided under the Labor Management Relations Act, *as amended*, 29 U.S.C. § 141 *et seq.* (1970). However, we believe that in enacting sec.

110(b) Congress intended to create a private administrative remedy against retaliation for activities enumerated therein akin to, but not duplicative of, the protection for similar and related kinds of activities under the general labor law.<sup>3</sup> Accordingly, precedents under that body of law dealing with retaliatory discharges are relevant, particularly as they deal with the principles governing the weight assignable to various kinds of evidence and with specific factual situations.

We come then to the triggering inquiry under the circuit court cases, left open by the Judge in this case, of whether there actually was a legitimate cause for discharge.<sup>4</sup>

As noted earlier, Respondent claims to have discharged Applicant on account of his two consecutive unexcused absences on Monday and Tuesday, Jan. 20 and 21, 1975. To recapitulate the pertinent undisputed circumstances of these two absences briefly: Applicant was absent, on Jan. 20 because he delayed his return from a family reunion; he was aware prior to leaving for the weekend that he might

<sup>3</sup> See 115 Cong. Rec. 27948 (1969).

<sup>4</sup> Judge Broderick made no flat finding on the question of legitimate cause on the theory that the "total circumstances" showed an unlawful motivation under sec. 110(b). (Dec. 11.) However, by not determining whether there was a legitimate cause for discharge, and if so, whether its invocation was a pretext, he did not properly consider critical circumstances in the totality of circumstances which bear importantly on the viability of an inference of unlawful motivation. Indeed *NLRB v. Ace Comb Co., supra*, and *Shattuck Denn Mining Corp. v. NLRB*, 362 F. 2d 466 (9th Cir. 1966), two cases cited by the Judge, demonstrate this proposition.

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not be at work on Monday, but he did not seek leave to be absent although he could have done so; the Tuesday absence was due to exhaustion produced by his late arrival home on Tuesday morning caused by unanticipated circumstances beyond his control; he was precluded from seeking permission to be absent or from notifying Respondent of his exhaustion because his telephone was out of order.

Respondent argues that it had cause for discharge under these circumstances on the basis of Article XXII, Sec. (i) of the Contract which provides:

Sec. (i) *Irregular Work*

When any employee absents himself from work for a period of two (2) days without consent of the employer, other than because of proven sickness, he *may* be discharged. [Italics added.]

A literal reading of this unambiguous section supports Respondent's claim to an unqualified right to discharge a miner for two consecutive absences without consent or proved illness. Since Applicant had neither, there was legitimate cause for discharge.

However, inasmuch as this clause by its terms is permissive, not mandatory, it is necessary to inquire into the practice under it in order to determine whether its invocation by Respondent was a pretext. We emphasize, however, that we are not concerned here with whether the practice or any part of it was fair generally or as applied to this case. *NLRB v. Ace Comb Co., supra*, 342

F. 2d at 847.<sup>5</sup> Rather, we are interested only in determining if others similarly situated have also been discharged under the subject contractual clause, because the lack of such other discharges would lend credence to Applicant's insistence that he was not discharged for the routine cause of absenteeism. More narrowly, the issues here boil down to whether and to what extent did Respondent retroactively excuse consecutive absences without prior consent or medical excuse and, further, whether an initial transgression led invariably to immediate discharge.

Applicant, testifying for himself, claimed that Respondent normally excused absences for personal business if the employee called and " \* \* \* had taken pains to notify the company \* \* \*" beforehand (Tr. 65). He also said: " \* \* \* it's been a practice either calling in beforehand or when returning to work to square it up with the company why you were out, whether you were sick or had difficulties or personal business." (*Id.*) It is plain that Applicant knew that squaring up meant having "good cause" (Tr. 64). When queried with respect to his own absence record, he testified: "I am quite positive I was never absent two consecutive days without prior consent or proven illness" (Tr. 130).

<sup>5</sup> Respondent has contended that the Judge allowed himself to be swayed by the severity of the penalty exacted for the contractual offense charged. We find nothing in the opinion below to give substantial support to that argument.

He also referred to purported instances in 1973 and 1974 when he had been retroactively excused for a single absence for good cause due to exhaustion (Tr. 64) and unanticipated automobile breakdown (Tr. 276-8, Ex. 28).

Hubert Brewster, an official of the local union, was called to the stand by Applicant, and he testified that, to his knowledge, no person had ever been discharged under the subject provision of the Contract unless he had been previously warned or subjected to some lesser discipline for 2 consecutive days of unexcused absence (Tr. 131, 139, 146).

Mr. Brewster's testimony was corroborated by one of Applicant's co-workers, Jimmie Sword (Tr. 147, 270-1).

More importantly, there is support for Mr. Brewster's account of Respondent's practice under Article XXII, Sec. (i) of the Contract in several pieces of documentary evidence. Applicant introduced into evidence the record of the discharge proceeding of Jimmy Carl Booth which was held before a Joint Board consisting of two company representatives and two representatives of the United Mine Workers of America. The Joint Board sustained Booth's discharge which had been predicated upon chronic absenteeism in excess of 10 percent which made him subject to dismissal under a 1957 precedent on percentage absenteeism (Applicant's Exhibit Nos. 19, 6), that is separate and distinct from the subject con-

tractual clause dealing with consecutive absenteeism. An examination of the exhibits in the Booth discharge proceeding, which included copies of his attendance record and two prior disciplinary slips, reveals that on at least one occasion he was absent without prior permission or a doctor's excuse on 2 consecutive days. For that offense, he received only a warning.

In addition to the record of the Booth discharge proceeding, Applicant also introduced into evidence, as Applicant's Exhibit No. 22, Xerox copies of 66 disciplinary slips for absenteeism drawn from the files of the union mine committee which receives a copy of all such slips. Of these, the slips issued to Hollis Johnson, Jr. (Applicant's Exhibit No. 22, p. 2), and Guy Smith (Applicant's Exhibit No. 22, p. 20), are of particular interest because the former, a *second* warning, showed an unexcused absence rate of 79 percent for a single month and the latter, a first warning, stated that he had been absent without excuse for 91.6 percent of the time in 1 month.<sup>6</sup>

Respondent sought to rebut Applicant's evidentiary presentation with the testimony of several witnesses. Arnold Shrader, Applicant's section foreman at the time of dis-

<sup>6</sup> The percentage of absenteeism is calculated by dividing the total number of unexcused absences by the total number of work days in a month (Tr. 251-2).

The percentages of Johnson and Smith are sufficiently large to support the conclusion that each must have had consecutive absences. Respondent did not present the employment records of either man to prove otherwise.

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charge, stated that he had on occasion excused Applicant for *an* absence, but only where there had been a doctor's excuse (Tr. 210). B. V. Hyler, personnel manager for the Bishop Mine, testified that the normal and invariable practice under Article XXII, Sec. (i) was to discharge an employee if he misses 2 days in a row without prior consent or illness regardless of any excuse and without a disciplinary warning slip for an initial offense (Tr. 256). On cross-examination, Hyler was confronted with the record of the Booth discharge and admitted that there was a showing of 2 consecutive days of absence, and further, that Booth accordingly could have been discharged under Article XXII, Sec. (i) (Tr. 253-4). Hyler also testified concerning an unidentified employee, in another mine under his company's management, whose discharge for 2 days of absence was upheld by an arbitrator despite the fact that such absence was caused by the need to care for his wife, who was ill, and for his children (Tr. 257-8). Hyler's testimony regarding the general practice of discharging employees for consecutive unauthorized absences was corroborated by Mine Superintendents David Camp (Tr. 247) and Richard Baugh (Tr. 262). Respondent produced no documentary evidence to support its claims with regard to the practice under the subject contractual clause or to refute those of Applicant.

In weighing the foregoing evidence, we are of course well aware that the principal witnesses who testified all must be regarded as biased to some degree. We are therefore giving determinative weight to such testimony as is corroborated by the documentary evidence described above. We are doing so because the reliability of such evidence has not been rebutted by Respondent although it was in a position to do so. Respondent only objected to the admission of such evidence on the ground of hearsay, an objection plainly without merit. 5 U.S.C. § 556(d) (1970). We consider these documents the kind of affirmative and persuasive evidence to which the circuit courts referred in their decisions in cases cited above.

As our analysis of the record shows, Applicant did not point to any instance where 2 days of consecutive absence was completely excused. He was able to document a single absence which was excused for unanticipated transportation difficulties beyond his control (Applicant's Exhibit No. 28, p. 2), and mentioned another involving exhaustion. But inasmuch as *consecutive* absences were apparently considered more heinous industrial offenses under the Contract, we cannot find, based upon what was produced, that Respondent had a practice of excusing such absences without prior permission under any and all circumstances, which is

practically what Applicant would apparently have us believe.<sup>7</sup>

Applicant did, however, prove by a preponderance of the evidence that first offenses under the subject contract provision, such as that involved here, did not invariably result in discharge as Respondent contends.<sup>8</sup> The documentary evidence produced on this issue, in our opinion, refutes the undocumented testimony of Respondent's witnesses to the effect that any and all offenses under the subject contract provision resulted in discharge regardless of the circumstances. The three instances of consecutive absence described above where disciplinary slips constituting warnings were issued are, in the absence of rebuttal or explanation, sufficient to support a finding that the normal practice for a first offense of this kind was a warning.

Respondent's claim in this phase of its appeal was that there was no affirmative and persuasive evidence adduced by Applicant to show by a preponderance that the legitimate cause for discharge it claims to have had was a mere pretext. Having found that Applicant did indeed ad-

duce such evidence, we reject Respondent's argument.

2.

We turn now to Respondent's second claim, namely, that Judge Broderick erred in concluding that there was sufficient evidence to warrant his ultimate inference that retaliation for protected reporting activities was an underlying motivation for Applicant's discharge.

Judge Broderick drew this ultimate inference for several reasons which he listed at page 9 of his decision. We discuss here in some detail only those parts of the record to which he referred which, when considered together, possessed the substantiality and probative value to warrant that inference.

From June 1974 through Jan. 1975, Applicant was involved in a number of activities concerning alleged safety hazards which resulted in disruption of production and in the issuance of citation under the Act.<sup>9</sup> There is no dispute about Respondent's knowledge of Applicant's role in instigating these occurrences. Neither can there be any serious doubt as to Respondent's general irritation with him, despite some protestations to the contrary. However, while general expressions of irritation not constituting threats can support the inference that Respondent must have derived

<sup>7</sup> Applicant's statements, quoted earlier, as to the practice regarding retroactive excuses for any personal business, are biased and of such dubious probability as to warrant their being given little weight no matter how credibly they were uttered on the stand.

The testimony of Respondent's witnesses, to the effect that excuses for consecutive absences were never given retroactively, is similarly afflicted.

<sup>8</sup> Respondent never sought to rebut Applicant's claim that these absences constituted his first offense under this section of the Contract.

<sup>9</sup> Reference is made by Judge Broderick to a Jan. 1973 alleged retaliatory assignment of Applicant to the task of abating a hazard as to which he had complained. This incident is too remote in time and too inconclusive to be relevant.

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satisfaction from discharging Applicant, such expressions do not provide a sufficient basis for inferring that Respondent's assertion of legitimate cause to discharge was a pretext for an unlawful motive.<sup>10</sup> However, two of the incidents reveal more than a general expression of irritation and, more to the point, involve complaints to MESA.<sup>11</sup>

The first of these complaints occurred in June 1974 when Applicant reported to authorized representatives of the Secretary in the Mining Enforcement and Safety Administration (MESA) the existence of alleged fan malfunctions in several of Respondent's mines and of the alleged failure of Respondent to withdraw men in the event of fan stoppage according to an approved plan. As a result of his complaint, MESA inspected the Bishop 36 and 33-37 Mines on June 11, 1974, and issued several notices of violation. There is no question that Respondent knew who was the source of the complaint (Tr. 90-1, Applicant's Exhibit No. 7). Joining the MESA inspectors in responding to

Applicant's complaint were a representative of the West Virginia Department of Mines, Mine Superintendent David Camp, Jonathan Williams, International Safety Coordinator for District 29, UMWA, and the Safety Committee of Local 6025, consisting of Paul Goad, William Bennett, and Applicant. During the course of the inspection, the MESA and West Virginia representatives had occasion to examine a fan record book and apparently to pronounce themselves satisfied with it. Applicant alone, however, persisted in *complaining*, and Superintendent Camp lost his temper and cursed Applicant for his stubborn persistence (Tr. 236-7). Immediately following the inspection, Applicant was discussing the inspection with a group of miners in the bathhouse at which point he claims to have been assaulted and physically ejected from the bathhouse by Camp, a claim believed by the Judge despite Camp's denial. Camp subsequently apologized for his action.<sup>12</sup>

Respondent argues that the Judge erred in admitting evidence of those June 1974 events on the ground that sec. 110(b)(2) of the Act, 30 U.S.C. § 820(b)(2) (1970), bars applications for review of acts of "discrimination" after 30 days. Respondent also contends that the Judge erred in crediting Appli-

<sup>10</sup> Similarly, in the labor law context, proof of general antiunion animus is not a sufficient basis for the inference that the assertion of a legitimate cause for discharge was a pretext for retaliation against protected concerted activity. See *NLRB v. Patrick Plaza Dodge, Inc.*, *supra*.

<sup>11</sup> Respondent points out that Applicant sometimes complained on his own behalf and others as a member of the Safety Committee. Respondent has argued that this distinction is important in considering the latter times because there is no evidence that any action was taken with respect to other committee members. We reject this argument because the record clearly shows that Applicant was the dominant activist among the members, a fact well-known to Respondent.

<sup>12</sup> Applicant persisted with his oral complaints about recordkeeping and eventually 12 notices of violation were issued which shows that his complaints were not frivolous (Dec. 6-7).

cant's version of the alleged assault and battery in view of Respondent's denial and the lack of corroboration. The former contention is without merit because the evidence here was admitted to show a state of mind and a tendency to overt retaliatory action for protected activities rather than to establish a separate claim for relief from an allegedly "discriminatory" act. The latter contention is likewise without merit because Respondent has made no showing that the statements of Applicant believed by the Judge over Camp's denial were inherently improbable, inconsistent internally or with his other testimony, or belied by other, more persuasive evidence. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951). While it is true that there is no corroboration for those statements, that lack goes to probative weight and does not warrant overturning the pertinent credibility judgments made below. In addition, we think that Camp's apology is, to some extent, an implied admission of fault, which tends to enhance the veracity and probative value of Applicant's disputed statements.

The second complaint of note occurred in Jan. 1975 just over 2 weeks before discharge took place, and is for that reason more strongly probative of Respondent's attitude at the time of discharge than the incident just recounted. More specifically, on Jan. 13, 1975, Applicant complained to MESA that Respondent was not properly maintaining the sanding devices on man-

trip buses in the No. 34 Mine and suggested that the same might be true with respect to the Nos. 33 and 36 Mines. The next day MESA responded by conducting an inspection of the No. 34 Mine and showed a copy of the complaint to Mine Superintendent Richard Baugh. Each of these inspections resulted in the issuance of a notice of violation and a withdrawal order. On Jan. 15, 1975, Applicant was assigned the task of cleaning the sanding devices on the portal buses, a task within his job classification (Tr. 79, 224-7). The important aspect of this assignment is that when it was made by Foreman Arnold Shrader, Applicant was told by Shrader that since he was the one who made the complaint, he would be the one to clean the bus (Tr. 81).<sup>13</sup> Shrader tells a very different story, but here again the Judge chose to credit Applicant's account and we have been shown no basis to overturn his credibility determination. Shrader's statement establishes the retaliatory, bad faith character of this assignment.

These two incidents, so close in time to the discharge, demonstrate sustained irritation for the consequences suffered as a result of protected activity under sec. 110(b), which is focused on Applicant and has boiled over into overt, punish-

<sup>13</sup> Applicant calls our attention to the fact that this task was dirty and therefore undesirable. We think, however, that this alleged characteristic is irrelevant. Underground coal mining is tough and dirty work, and Applicant has shown nothing to support the conclusion that this task was unusually undesirable to perform.

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ing reactions. This history belies the claims of Respondent's witnesses that they were indifferent to his complaints, and looms especially large in light of the documentary evidence showing that first offenses under Article XXII, Sec. (i) of the Contract were ordinarily dealt with by a disciplinary warning slip.

The latter evidence of the practice under the subject contractual clause, which we have found sufficient to overcome Respondent's claim of reliance on legitimate cause, in and of itself, casts the discharge in a suspicious light, which gives rise to the inference that Respondent was concealing an unlawful motivation and makes it comparatively unlikely that the real motivation was entirely innocent. The history of focused irritation coupled with overt retaliatory actions reinforces that same inference and identifies the motivating cause but for which the discharge would not have occurred, namely, reports of safety hazards to authorized representatives of the Secretary.

## B.

### *Applicant's Appeal*

#### 1.

[2] Applicant contends that Judge Broderick erred in his consideration of Applicant's Jan. 15, 1975, assignment to the cleaning of sanding devices on portal buses, subsequent to his complaints to MESA about them. Judge Broderick took this alleged incident into

account in reaching his ultimate finding that Applicant's discharge was unlawfully motivated by his reporting activities. We are affirming his judgment on this aspect of the case, *supra* at 52 on the ground that the assigning foreman had directly stated that such assignment was retaliatory. However, Applicant asks us to go further and conclude as a matter of law that the subject assignment was a discriminatory act proscribed by sec. 110(b)(1)(A) of the Act.

While a declaratory decision is apparently within the scope of the broad relief which the Secretary may grant under sec. 110(b)(2) of the Act,<sup>14</sup> that kind of relief must be specifically requested. 43 CFR 4.562(d).<sup>15</sup> Analysis of the application for review filed by Applicant reveals that the relief requested related exclusively to an alleged discriminatory discharge. There are three allegations in the application dealing with the subject work assignment which read as follows:

2(b) On Jan. 10, 1975 at approximately 5 p.m. he notified an authorized repre-

<sup>14</sup> In pertinent part, section 110(b)(2), referring to the Secretary, provides: " \* \* \* If he finds that such violation did occur, he shall issue a decision, incorporating an order therein, requiring the person committing such violation to take such affirmative action to abate the violation as the Secretary deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner or representative of miners to his former position with back pay. \* \* \*"

<sup>15</sup> Sec. 4.562(d) of 43 CFR states:

"An application for review of discharge or acts of discrimination shall be supported by an affidavit of a person with knowledge of the facts surrounding the alleged discharge or acts of discrimination and a statement of the relief requested." [Italics added.]

sentative of the Secretary of alleged violations and dangers relating to the sanding devices on the man buses.

3. That as a direct result of the telephone call referred to in ¶2(b) above the Bishop Coal Company discriminated against Steve Shapiro by directing him to thereafter clean the man buses each afternoon, such work is not the sort of work normally done by a person in Steve Shapiro's classification and in practice has not been done by a person in Steve Shapiro's classification in the Bishop Coal Company.

\* \* \* \* \*

5. That said acts of discrimination and suspension and discharge violated § 110 (b) (1) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C.A. § 820 (b) (1).

Statements 2(b) and 3 are, except for a conclusory reference to "discrimination," allegations of fact which relate to the ultimate inference and the relief sought with respect to the discharge. Statement 5 is a bare conclusion of law and inasmuch as no relief was sought which related to the alleged discriminatory act, the Judge apparently treated it as surplusage.

We recognize that applications for various kinds of relief under the Act should be construed generously and indeed we have done so in the past in appropriate situations. *See e.g., Hatfield v. Southern Ohio Coal Co.*, 4 IBMA 259, 82 I.D. 289, 1974-1975 OSHD par. 19, 758 (1975), *appeal pending*, D.C. Cir., No. 75-1704; *Eastern Associated Coal Corp.*, 5 IBMA 74, 82 I.D. 392, 1975-1976 OSHD par. 19, 921 (1975). However, there is a difference between reading a claim for relief generously and finding that

there are two such claims when only one has been stated. In our opinion, Judge Broderick correctly read the application as stating one claim for relief and we hold that he did not err in ignoring a mere conclusion of law.

2.

[3] Applicant also attacks the Judge's finding that an *underlying* motivation was that Respondent regarded him generally as an unsatisfactory worker. Applicant contends that the record does not show that he was an unsatisfactory worker, and further, even assuming *arguendo* that the record does contain such evidence, the quality of his work was not an underlying motivation for the discharge.

Contrary to Applicant's initial contention in this phase of his cross appeal, we think that Respondent may well have regarded him as a generally unsatisfactory worker.

The circumstances accounting for the first day of the two which led to his discharge is a case in point. Applicant was absent on Monday, Jan. 20, 1975, because he had decided to take a long weekend for his personal *pleasure* regardless of the wishes of or impact on Respondent. The issuance date on the airplane ticket, Jan. 17, 1975, shows that he planned not to be at work that day.<sup>16</sup> Despite the opportunity to seek permission from Respond-

<sup>16</sup> Applicant sought to explain away the issuance date on his ticket by saying that he was undecided as to whether he would come back on Sunday or Monday, an unpersuasive explanation which is self-serving, and quite beside the point.

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ent, Applicant simply chose to present his employer with a *fait accompli*. His behavior was clearly irresponsible, irrespective of whether it was excusable under the practices at the Bishop mines.

Moreover, while we think that the record shows Applicant to have been a vigorous force in riveting Respondent's attention on health and safety hazards and forcing their abatement, it also discloses that he was not an untarnished crusader. An illustration of this point occurred in Aug. and Sept. 1974. In Aug., Applicant complained to Foreman Shrader about an alleged condition that he considered hazardous, namely, placement of supplies under an unguarded high voltage cable. In Sept., the Safety Committee, of which he was a member, attempted to press this complaint with two of Respondent's officials.<sup>17</sup> On the day following this meeting, Applicant saw that supplies were being unloaded in the vicinity of the power cable, and he decided to take matters into his own hands. He appointed two roof bolters, Larry Pitts and Joe Edison, as temporary safety committee members, and they left their immediate tasks to respond to his call. The record shows that in doing so, Pitts left a safety lamp burning

and deserted his still energized roof bolting machine (Tr. 213-14). The ostensible reason for this work stoppage was the supposed necessity to deal with the imminent danger allegedly posed by the condition of the power cable. As far as the evidence of record shows, Applicant had no authority to appoint the *ad hoc* safety committee members, and given the longstanding nature of the condition that Applicant found so objectionable, we have considerable doubt that he or the committee had reasonable grounds to believe that there was an imminent and therefore "abnormal danger" or that there was a necessity to resort to self-help instead of exercising the statutory right to complain directly to MESA and call for an inspection. 30 U.S.C. § 813(g) (1970). See 29 U.S.C. § 143 (1970) and *Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368, 385-7, n. 16 (1974).<sup>18</sup>

<sup>18</sup> Sec. 103(g), 30 U.S.C. § 813(g) (1970), provides:

"Imminent danger notice; requisites; special inspection. (g) Whenever a representative of the miners has reasonable grounds to believe that a violation of a mandatory health or safety standard exists, or an imminent danger exists, such representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual miners referred to therein shall not appear in such copy. Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provisions of this subchapter."

<sup>17</sup> We should point out here that, by virtue of his position as a Safety Committeeman and of his experience demonstrated by the record, it is fair to say that Applicant was well aware that he need not complain to Respondent or obtain Safety Committee approval before lodging a complaint with MESA.

In addition, while there is some evidence in the record showing that Respondent may have been critical on occasion (Tr. 199-200) with respect to Applicant's performance as a coal miner, the record also shows that his performance was not generally considered substandard (Tr. 232).

But despite the evidence of record showing that Respondent could have and probably did regard Applicant as unsatisfactory, we see nothing therein to demonstrate that this perception was an underlying factor in the discharge. By *underlying*, we mean the moving force *but for which* the discharge would not have occurred.

Respondent's alleged dissatisfaction with Applicant clearly does not meet this test because, as he cogently points out, Respondent never claimed such dissatisfaction to be the cause of discharge. If the real cause for discharge was indeed the innocent one of general dissatisfaction, then we think Respondent would have asserted it in defense. Since it did not do so and had no reason to conceal such a motivation, we conclude that general dissatisfaction was not a moving force *but for which* the discharge would not have occurred. On that basis, we hold that the Judge erred in finding such factor to be underlying.

Having previously affirmed the Judge's finding that retaliation for Applicant's complaints to the Sec-

retary was a moving force behind his discharge, we now find that it was *the sole* underlying factor.<sup>19</sup> Therefore, we conclude that Applicant was discharged by reason of the fact that he engaged in activities protected under section 110(b)(1)(A) of the Act, and we affirm the result reached below.

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that Applicant's motion for remand to reopen the record IS DENIED.

IT IS FURTHER ORDERED, that the result in the above-captioned docket IS AFFRIMED and the case IS REMANDED for determination of unsettled remedial matters.

DAVID TORBETT,

*Alternate Administrative Judge.*

WE CONCUR:

DAVID DOANE,

*Chief Administrative Judge.*

HOWARD J. SCHELLENBERG, JR.,

*Administrative Judge.*

<sup>19</sup> Respondent has argued that, where the underlying motivation is a mixture of the legal and illegal, there is no violation of section 110(b)(1). Since we conclude that the underlying motivation here was not so mixed, and Respondent never claimed that it was, we need not reach this question. But see *NLRB v. Jamestown Sterling Corp.*, 211 F. 2d 725 (2d Cir. 1954); *Socony Mobil Oil Co., Inc. v. NLRB*, 357 F. 2d 662 (2d Cir. 1966); *F. J. Buckner Corp. v. NLRB*, 401 F. 2d 910 (9th Cir. 1968), cert. den., 393 U.S. 1084 (1969).

*March 4, 1976***ESTATE OF HUBERT FRANKLIN  
COOK****5 IBIA 42***Decided March 2, 1976***Appeal from an order denying petition  
for rehearing.****AFFIRMED.****1. Indian Probate: Half Blood: Gen-  
erally—250.0**

State statutes of descent and distribution as construed and interpreted by the highest court of the state involved will be considered by the Department as controlling in trust heirship proceedings.

**APPEARANCES:** Pipestem & Rivas, by F. Browning Pipestem, Esq., for appellants.

**OPINION BY ADMINISTRA-  
TIVE JUDGE SABAGH****INTERIOR BOARD OF  
INDIAN APPEALS**

This matter comes before the Board on appeal from an Administrative Law Judge's order denying petition for rehearing.

It appears that Hubert Franklin Cook, an unallottee of the Caddo and Pima Tribes died intestate at Fort Sill, Oklahoma, on Apr. 27, 1973, survived by four nieces and three nephews, children of Josephine Cook, decedent's half-blood Pima sister from the first marriage of decedent's father, Luke Frank Cook. Luke Frank Cook, an allotted Pima Indian died intestate on Mar.

16, 1971. Decedent's mother, Annie Johnson, an allotted Caddo Oklahoma Indian, died intestate on Oct. 3, 1949.

At the time of his death, the decedent was possessed of interests in certain allotted lands some of which were inherited from his father, Luke Frank Cook, and some from his mother, Annie Johnson.

After hearing held on Aug. 21, 1974, Administrative Law Judge John F. Curran issued an Order Determining Heirs on Feb. 21, 1975, wherein he found that four nieces and three nephews referred to, *supra*, were entitled to inherit decedent's interests in the trust and restricted property located on the Wichita-Caddo, Absentee Shawnee, Salt River and Gila River Reservations.

On Feb. 5, 1975, certain whole-blood first cousins of the decedent on his mother Annie Johnson's side filed a motion and demand for hearing to determine heirs with respect to the lands situated in the State of Oklahoma inherited by decedent through his maternal Caddo ancestors and blood line.

Judge Curran decided in the Order Determining heirs of Feb. 21, 1975, that intestate succession as relating to the Oklahoma property came under Subsection 6, Section 213, Title 84, Oklahoma Statutes. Pursuant thereto, the Judge concluded the nieces and nephews are the nearest blood relatives and the "next of kin" and are the heirs at law to the exclusion of the cousins.

The cousins petitioned for rehearing contending that the Order Determining Heirs as it related to their motion and demand for hearing referred to, *supra*, was in error. The petitioners further contended that *In the Matter of the Estate of Robbs v. Howard*, 504 P. 2d 1228 (Okl. 1972), wherein the Oklahoma Supreme Court construed the provision of the Oklahoma Statute relating to kindred of the half-blood, was distinguishable and hence not representative of the law applicable to this case.

Administrative Law Judge Jack M. Short, who succeeded Judge Curran, denied said petition on May 1, 1975. He concluded that *Robbs* did apply and that this case was not distinguishable.

In his Order of May 1, 1975, denying said petition, Judge Short arrived at the following conclusion—

In *Robbs*, the Supreme Court of Oklahoma construed 84 O.S. 1971, § 222, which provides:

Kindred of the half-blood inherit equally with those of the whole blood in the same degree, unless the inheritance come [sic] to the intestate by descent, devise or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestors must be excluded from such inheritance.

and held at page 1,232 of its opinion:

We therefore hold that our half blood statute, 84 O.S. 1971, § 222, is applicable only when the surviving half blood kindred and whole blood kindred are related to decedent in the same degree, and that it does not operate to disinherit nearer half blood kindred not of the blood of the ancestor in favor of more remote

whole blood kindred who are of the blood of the ancestor. [Italics added.]

and specifically overruled the contrary holding in *Thompson v. Smith*, 102 Okl. 50, 227 P. 77 (1924).

Also, at page 1,230 of its opinion in *Robbs*, the Supreme Court stated:

In 1930, in the face of intervening conflicting decisions on the question, this Court abandoned the doctrine that Indian allotments are ancestral estates and specifically overruled the *Hill* holding on that question. See *In re Yahola's Estate*, 142 Okl. 79, 285 P. 946.

Judge Curran stated on page 2 of his Order of February 21, 1975, "The nieces and nephews are related to the decedent in the third degree while the first cousins are related to decedent in the fourth degree." This is an undisputed fact. Hence, 84 O.S. 1971, § 222 cannot apply in view of *Robbs*. And, intestate succession is governed by 84 O.S. 1971 § 213(6). *Dobson v. Mecom*, Okl. 311 P. 2d 210 (1956).

[1] The Interior Board of Indian Appeals held in *Estate of Minnie May Riordan*, 2 IBIA 98 (1973):

State statutes of descent and distribution as construed and interpreted by the highest court of the state involved will be considered by the Department as controlling in trust heirship proceedings.

The Supreme Court of Oklahoma is the highest court in Oklahoma. It has ruled without equivocation on each of the issues raised by Petitioners and contrary to their contentions.

We adopt the Judge's findings and conclusions as our own.

We do not agree with appellants that *Robbs* is distinguishable here, in light of the foregoing and the fact that the nieces and nephews are related to the decedent in the third degree while the first cousins are related to the decedent in the fourth degree.

NOW, THEREFORE, by virtue of the authority delegated to the

March 15, 1976

Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge dated May 1, 1975, denying appellants' petition to rehear, be, and the same is hereby **AFFIRMED** and the appeal herein is **DISMISSED**.

This decision is final for the Department.

MITCHELL J. SABAGH,  
*Administrative Judge.*

I CONCUR:

ALEXANDER H. WILSON,  
*Administrative Judge.*

## ARMCO STEEL CORPORATION

6 IBMA 64

Decided March 15, 1976

Appeal by the Mining Enforcement and Safety Administration from that part of a decision by Administrative Law Judge George H. Painter vacating one notice of violation in a civil penalty proceeding (Docket Nos. HOPE 75-725-P, 75-743-P, and 75-759-P) brought pursuant to section 109(a)(1) of the Federal Coal Mine Health and Safety Act of 1969.

Reversed in part.

Federal Coal Mine Health and Safety Act of 1969: Notices of Violation: Party to be Charged.

Where the miners employed by an operator of a coal mine are exposed to a safety hazard created by the lack of required

backup alarms on delivery trucks owned by a seller of coal and where the operator is in a realistic position to prevent or abate the violation with a minimum of due diligence, such operator is a proper party to be charged with the violation. 30 CFR 77.410.

**APPEARANCES:** Thomas A. Mascolino, Esq., Assistant Solicitor, Leo J. McGinn, Esq., Trial Attorney, for appellant, Mining Enforcement and Safety Administration; William C. Payne, Esq., Stephen H. Watts II, Esq., for appellee, Armco Steel Corporation.

*OPINION BY ADMINISTRATIVE JUDGE SCHELLENBERG*

## INTERIOR BOARD OF MINE OPERATIONS APPEALS

### *Background*

The subject of this appeal is Notice No. 1 OLM, issued by Mining Enforcement and Safety Administration (MESA) inspector Orie L. Martin on July 24, 1974, at No. 7 Preparation Plant of Armco Steel Corporation (Armco) located at Montcoal, West Virginia. The notice cited a violation of 30 CFR 77.410 as follows:

The automatic reverse warning devices were inoperative on the Nos. 6, 25, 19, and 14 coal haulage trucks.<sup>1</sup>

On Apr. 11, 1975, MESA filed a petition for assessment of civil penalty

<sup>1</sup> 30 CFR 77.410 provides: "Mobile equipment, such as trucks, forklifts, front-end loaders, tractors and graders, shall be equipped with an adequate automatic warning device which shall give an audible alarm when such equipment is put in reverse."

under the Federal Coal Mine Health and Safety Act of 1969 (Act)<sup>2</sup> and a hearing was held on June 24, 1975, at Charleston, West Virginia.

The evidence disclosed that Eagle Coal and Dock Company (Eagle), a coal mine operator in its own right, had sold coal to Armco and was engaged in delivering coal to Armco, the purchaser, when the Notice of Violation was issued. Armco purchased the coal by the ton and up to 500 tons a day were delivered in Eagle trucks driven by Eagle drivers. Armco did not lease the trucks and had no power to hire or fire the drivers. Armco assisted Eagle in abating the violation. The inspector who issued the notice testified that at least one, and possibly two, Armco employees worked at the location where the trucks unloaded and would be endangered by inoperative backup alarms.<sup>3</sup>

The Judge issued his decision on Sept. 24, 1975. He concluded that since Armco had no control over the drivers and did not materially abet the violation it was not the proper party to be charged. He therefore vacated this Notice of Violation and assessed total penalties for all three dockets in the amount of \$2,075.

### *Issue Presented*

Whether the Judge erred in vacating Notice of Violation No. 1 OLM, July 24, 1974.

<sup>2</sup> 30 U.S.C. §§ 801-960 (1970).

<sup>3</sup> The inspector was certain that Armco had a "car dropper" working at the unloading site. He was unsure whether another man, operating an "end loader" at the site was also an Armco employee (Tr. 7).

### *Discussion*

Since the Judge issued his decision the Board has decided two cases involving essentially the same facts as the instant case. In *Peggs Run Coal Company, Inc.* (Peggs Run)<sup>4</sup> the Board held that Peggs Run was the proper party to be charged in a notice of violation when trucks owned by a haulage contractor operated without backup alarms on Peggs Run property and endangered Peggs Run employees in the loading area. The Board stated that only a "minimum of diligence" would have been required to prevent the non-equipped trucks from operating in an area where its employees would be endangered. In *West Freedom Mining Corporation, et al.* (West Freedom)<sup>5</sup> six independent contractor-owned haulage trucks without backup alarms operated on West Freedom property endangering its employees. Applying the Peggs Run rationale, the Board found that West Freedom could have prevented or removed the hazard with a "minimum of effort." While we recognize that in the instant case Eagle, as the owner of trucks, personal property being utilized at a coal mine within the broad definition of the Act, could itself be cited for the violation, we are called upon here to decide only whether *Armco* was properly charged. The inspector, observing

<sup>4</sup> 5 IBMA 175, 82 I.D. 516, 1975-1976 OSHD par. 20,033 (1975).

<sup>5</sup> 5 IBMA 329, 82 I.D. 618, 1975-1976 OSHD par. 20,230 (1975).

the trucks with inoperative backup alarms, was required to make this judgment in the field where questions as to ownership, responsibility for safety, and contractual relationships may not be readily ascertainable. We believe that Armco was properly charged and that the rationale of the above-cited cases is applicable. Armco could easily have determined whether the trucks had functioning backup alarms and thus be assured that none of its miners would be exposed to this hazard. Moreover, the responsibility under the Act to provide a safe working environment is in no way diminished nor shifted from the operator's shoulders by virtue of the fact that only one, and possibly two of its employees may be endangered by the violation. Having concluded that Armco was properly charged for this violation we turn now to consider what amount should be assessed as civil penalty.

For purposes of assessment of a civil penalty herein we note that the Judge made the following findings with respect to the statutory criteria set out in sec. 109(a) of the Act:

1. There is no significant history of previous violations.
2. Armco is a large operator and penalties assessed should be appropriate to its size.
3. Penalties reasonably assessed will not adversely affect the opera-

tor's ability to remain in business.

4. The operator demonstrated good faith in abating the subject violation.

The Board is of the opinion that the backup alarm violation was the result of ordinary negligence and was only moderately serious since it was shown that at most two persons were endangered by the lack of the alarms. We conclude that a penalty of \$200 is warranted therefor.

### ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that:

1) That part of the Judge's decision vacating *Notice of Violation No. 1 OLM, July 24, 1974*, IS REVERSED, the notice IS REINSTATED, the violation IS AFFIRMED, and a penalty of \$200 IS ASSESSED therefor; and

2) Armco shall pay penalties in the total amount of \$2,275, on or before 30 days from the date of this decision.

HOWARD J. SCHELLENBERG, JR.,  
*Administrative Judge.*

I CONCUR:

DAVID DOANE,  
*Chief Administrative Judge.*

**BROWN W. CANNON, JR., ET AL.**

24 IBLA 166

Decided *March 16, 1976*

Appeal from decision of the Colorado State Office, Bureau of Land Management, dismissing a protest to the acceptance of compensatory royalty bid C-22636.

**Affirmed.**

**1. Oil and Gas Leases: Rights-of-Way Leases—Rights-of-Way: Generally**

Where a protest against the United States entering into a compensatory royalty agreement pertaining to oil and gas underlying a railroad right-of-way pursuant to the Act of May 21, 1930, 46 Stat. 373, 30 U.S.C. § 301 *et seq.* (1970), is based upon an assertion that the protestants have title to the oil and gas under the right-of-way, the protest will be properly dismissed if it is found the United States has title to those minerals.

**2. Oil and Gas Leases: Rights-of-Way Leases—Railroad Grant Lands—Rights-of-Way: Nature of Interest Granted**

Although the grants of a right-of-way to a railroad under sec. 2 of the Act of July 1, 1862, and of title to odd-numbered sections of land under section 3 of that Act were grants *in praesenti*, the railroad's interest in the right-of-way land stems solely from sec. 2. There is no difference in its interest in portions of the right-of-way land which cross even-numbered sections of land and in portions which cross odd-numbered sections. Minerals underlying the right-of-way were reserved to the United States in both instances.

**3. Oil and Gas Leases: Rights-of-Way Leases—Rights-of-Way: Nature of Interest Granted**

Title to the oil and gas deposits underlying the right-of-way granted to a railroad by the Act of July 1, 1862, 12 Stat. 489, did not pass under a patent to the land that the right-of-way crosses. Rather, title remains in the United States.

**APPEARANCES:** Robert C. Hawley, Esq., and Gretchen A. VanderWerf, Esq., of Ireland, Stapleton, Pryor and Holmes, P.C., Denver, Colorado, for appellants.

**OPINION BY ADMINISTRATIVE JUDGE THOMPSON**

**INTERIOR BOARD OF LAND APPEALS**

Appellants<sup>1</sup> appeal from the decision dated June 5, 1975, of the Colorado State Office, Bureau of Land Management, which dismissed their protest to the acceptance by the State Office of compensatory royalty bid C-22636 by Manning Gas and Oil Company. The minerals involved underlie the right-of-way of the Union Pacific Railroad Company (hereafter referred to as the railroad) across the NW $\frac{1}{4}$  of section 17, T. 2N., R. 66 W., 6th

<sup>1</sup> The 10 appellants each hold a fractional ownership of varying amount in the undivided mineral interest in the adjoining lands crossed by the right-of-way described in this decision. The appellants are: Brown W. Cannon, Jr.; Charles G. Cannon; Reynolds G. Cannon; George R. Cannon; Sue M. Cannon; Margaret Cannon; George R. Cannon, Jr.; Claudia Cannon; Kerry McCan Cannon; and James R. Cannon.

March 16, 1976

P.M., Colorado. Appellants are the current titleholders to the minerals underlying the NW $\frac{1}{4}$  of section 17. They assert in their protest that their title includes oil and gas underneath the right-of-way. The State Office dismissed their protest for the reason that title to any such oil and gas is in the United States.

The right-of-way here is part of the right-of-way across public lands granted to the railroad by section 2 of the Act of July 1, 1862, 12 Stat. 489, *as amended*.<sup>2</sup> Sec. 3 of the Act of July 1, 1862, granted to the railroad odd-numbered sections of land along its right-of-way, with certain conditions and restrictions. Sec. 17 is one of those odd-numbered sections patented to the railroad. Appellants are, therefore, the current successors to the railroad's title.

[1] Oil and gas deposits underlying railroad or other rights-of-way acquired from the United States may be leased by the Secretary of the Interior pursuant to the Act of May 21, 1930, 30 U.S.C. § 301 *et seq.* (1970). Sec. 3 of that Act, 30 U.S.C. § 303 (1970), provides for compensatory royalty agreements with the owner or lessee of adjoin-

ing lands, or the holder of the right-of-way, whichever bids the higher amount or percentage of royalty it will pay. Manning Gas and Oil Company holds an oil and gas lease from appellants for the NW $\frac{1}{4}$  of sec. 17 and was the only bidder for the agreement. The Act of May 21, 1930, is applicable only if the United States has title to the oil and gas deposits underlying the right-of-way. Whether the United States or appellants have title to such oil and gas deposits is, therefore, the dispositive issue in this case. Dismissal of the protest was proper if title is in the United States.

[2] Appellants argue first that the limited title to a right-of-way granted to the railroad by sec. 2 of the Act of July 1, 1862, applies only where the right-of-way does not cross odd-numbered sections patented to the railroad under sec. 3 of the same Act. In support of this, appellants cite various Supreme Court decisions which held that grants under either sec. 2 or sec. 3 of the Act of July 1, 1862, are *in praesenti*, i.e., title to the right-of-way and to the odd-numbered sections of land passed to the railroad as of July 1, 1862, the date of the Act, regardless of when their specific location was determined. Appellants contend that because Congress intended that the railroad receive fee simple title to the odd-numbered sections, Congress must have intended that the fee simple title also apply to a right-of-way where it crosses an odd-numbered section

<sup>2</sup> The Act of July 1, 1862, 12 Stat. 489, contained the original land grant authorization for the Union Pacific Railroad Co. The Act was subsequently amended by: the Act of July 2, 1864, 13 Stat. 356; Resolution No. 34, May 7, 1866, 14 Stat. 355; the Act of July 3, 1866, 14 Stat. 79; and the Act of Mar. 3, 1869, 15 Stat. 324. The 1869 amendment authorized the Union Pacific to contract with the Denver Pacific Railway and Telegraph Co. for the construction of a railroad from Denver to Cheyenne under the terms of the 1862 Act. By the time the patent for section 17 was issued, the Denver Pacific had merged with the Union Pacific.

patented to the railroad, so that the two grants would not conflict. Therefore, appellants conclude, the railroad received title to the minerals underlying the right-of-way across the NW $\frac{1}{4}$  of section 17 and, by reserving only the surface interest to itself, included title to those minerals in its conveyance of the NW $\frac{1}{4}$  to appellants' predecessors in interest. Second, appellants argue that when the United States issued patents to land traversed by a right-of-way, title to the minerals underlying the right-of-way passed to the patentee of the traversed land, in this instance the railroad.

Appellants' argument that the railroad's patent to sec. 17 also conveyed fee simple title to the right-of-way requires an examination of the intent of Congress in the Act of July 1, 1862. Appellants contend that it would be illogical to assume that Congress did not intend for the railroad to receive full title to its right-of-way, including the minerals, where it crossed an odd-numbered section patented to the railroad.

We do not dispute that when the railroad received a patent for odd-numbered sections of land under sec. 3 of the Act of July 1, 1862, it owned the land in fee simple subject to outstanding reservations. *See Burke v. Pacific Railroad Co.*, 234 U.S. 669, 685 (1914). "An absolute or fee-simple estate is one in which the owner is entitled to the entire property, with unconditional power of disposition during his life." BLACK'S

LAW DICTIONARY 742 (Rev. 4th Ed. 1968). Therefore, if the railroad received fee simple title to its right-of-way, it would be able to use the land for *any* purpose or to dispose of it at will.

However, for the railroad to have complete control over the use and disposition of its right-of-way does not comport with the intent of Congress in granting the right-of-way. The Supreme Court has stated:

\* \* \* Manifestly, the land forming the right of way was not granted with the intent that it might be absolutely disposed of at the volition of the company. On the contrary, the grant was explicitly stated to be for a designated purpose, one which negated the existence of the power to voluntarily alienate the right of way or any portion thereof. The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted. \* \* \*

*Northern Pacific Railway Co. v. Townsend*, 190 U.S. 267, 271 (1903).

Neither the courts nor the Department of the Interior have ever recognized that a railroad receives any greater title than that described above in its right-of-way where it crosses an odd-numbered section of land patented to the railroad. In *H. A. & L. D. Holland Co. v. Northern Pacific Ry. Co.*, 214 F. 920 (9th

Cir. 1914),<sup>3</sup> the court, when considering the question of title in the right-of-way when it traverses odd-numbered sections patented to the railroad, stated:

We are unable to accept the view that, because the right of way at this place is in an odd-numbered section, the railroad company took the absolute title, unlimited by the implied condition of reverter attending the right of way grant. No substantial reason has been assigned, and clearly there is none, for assuming that Congress intended such an artificial and whimsical distinction. A strip of land 400 feet wide through the public domain was being withdrawn from private entry and dedicated as a right of way for a transcontinental railroad. The value of a right of way is dependent upon its continuity, and surely it could not have been contemplated that in case of reversion the government would get back only numerous disconnected fragments of that which it was granting as a continuous line. There is little weight in the suggestion that Congress could not have intended a uniform status for the entire right of way, because it doubtless knew that any route which might be selected would here and there traverse private holdings, and that therefore the continuity of the grant would be broken. True, absolute continuity was not to be expected, but when we consider the vast stretch of public domain over which the road would pass, and the rarity and insignificance of the private holdings, it may readily be concluded that these interruptions were thought to be negligible, as affecting the value of the right of way as a whole.

<sup>3</sup> The Act of July 2, 1864, 13 Stat. 365, contained the land grant authorization for the Northern Pacific Railroad Co. This Act is not to be confused with the amendments to the Act of July 1, 1862, which are set forth at 13 Stat. 356. (See fn. 2.) Secs. 2 and 3 of the 1864 Act are similar to secs. 2 and 3 of the 1862 Act. See *George W. Zarak*, 4 IBLA 82 (1971).

In support of their position, appellants invoke the general rule that, where two titles relate back to the same point of time, there is a merger, and the greater title prevails from the beginning. It is conceded, however, that this doctrine, if the appellants' application of it be correct, would here come into conflict with the controlling principle that the granting act must be construed in such a manner as to give effect to the legislative intent, provided it be found that Congress intended that the right of way throughout should be held subject to the conditions and limitations declared in the Townsend Case. Such, we have no hesitation in finding, was the intent of Congress, and therefore it is not deemed necessary to consider the correctness of the assumptions upon which appellants' application of the rule necessarily rests, namely, that, as the terms are used in the learning upon the law of merger, the estate of the grant-in-aid is greater than that of the right of way grant, and that they both date from the same point of time.

*Id.* at 924-25; accord, *People v. Tulare Packing Co.*, 25 Cal. App. 2d 717, 78 P. 2d 763, 765-67 (1938); *Crandall v. Goss*, 30 Idaho 661, 167 P. 1025, 1026-27 (1917).

The Department has also recognized the difference in title, particularly as it relates to underlying minerals:

\* \* \* Moreover, even though the right-of-way crosses odd-numbered sections of land, this does not make the railroad's title, as to such segments of the right-of-way, one acquired in fee simple absolute under section 3 of the act. \* \* \* [Citations omitted.]

Solicitor's Opinion, approved by the Secretary, 58 I.D. 160, 161 (1942).

Appellants urge that the reasoning of the Supreme Court in *United States v. Union Pacific Railroad Co.*, 353 U.S. 112 (1957), supports their position. In that decision, the Court held that the United States, not the railroad, owns the minerals underlying a right-of-way granted by the Act of July 1, 1862.

Appellants point to language at page 116 of that decision regarding the necessity for an administrative determination that lands were non-mineral in character before a patent would issue for an odd-numbered section of land under the section 3 grants, whereas such a determination was inappropriate for the section 2 right-of-way. They argue that the determination of non-mineral in character applies to the right-of-way where it crosses an odd-numbered section, and, therefore, the United States cannot now claim title to minerals underlying such a right-of-way. However, the overall language and tenor of Justice Douglas' opinion in that case does not support appellants' position. For example, he stated:

\* \* \* We would have to forget history and read legislation with a jaundiced eye to hold that when Congress granted only a right of way and reserved all "mineral lands" it nonetheless endowed the railroad with the untold riches underlying the right of way. Such a construction would run counter to the established rule that the land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it. *Caldwell v. United States*, 250 U.S. 14, 20-21. These are the reasons we

construe "mineral lands" as used in § 3 of the Act to include mineral rights in the right of way granted by § 2.

\* \* \* \* \*

\* \* \* But, construing the grant in § 2 favorably to the Government, as we must, we cannot conclude that Congress meant the policy it expressed, by excepting "mineral lands" in § 3, to be inapplicable to § 2 in the face of its admonition that the exception is applicable to the entire Act. Nor can we conclude that, because the administrative system, by which mineral resources in the grant of land under § 3 were reserved, was inappropriate to § 2, Congress did not intend appropriate measures to reserve minerals under the right of way granted by § 2. We cannot assume that the Thirty-seventh Congress was profligate in the face of its express purpose to reserve mineral lands.

*United State v. Union Pacific Railroad Co.*, *supra* at 116-17.

Obviously Justice Douglas was aware that the sec. 2 right-of-way traversed the odd-numbered sections granted by sec. 3 and that fee simple title to the odd-numbered sections would pass to the railroad. Yet, he made no distinction between the odd- and even-numbered sections of land as to the reservation of the minerals underlying the sec. 2 right-of-way. It is apparent that there was a distinction between the estates granted under secs. 2 and 3. Justice Douglas distinguished earlier cases because:

\* \* \* in none of them was there a contest between the United States and the railroad-grantee over any mineral rights underlying the right of way. The most that the "limited fee" cases decided was that the railroads received all surface rights to the right of way and all rights incident to a use for railroad purposes.

Great reliance is placed on *Great Northern R. Co. v. United States*, 315 U.S. 262 [1942], for the view that the grant of a right of way in the year 1862 was the grant of a fee interest. In that case we noted that a great shift in congressional policy occurred in 1871: that after that period only an easement for railroad purposes was granted, while prior thereto a right of way with alternate sections of public land along the right of way had been granted. In the latter connection we said, "When Congress made outright grants to a railroad of alternate sections of public lands along the right of way, there is little reason to suppose that it intended to give only an easement in the right of way granted in the same act." *Id.*, at 278. But we had no occasion to consider in the *Great Northern* case the grant of a right of way with the reservation of "mineral lands." The suggestion that a right of way may at times be more than an easement was made in an effort to distinguish the earlier "limited fee" cases. To complete the distinction, Mr. Justice Murphy with his usual discernment added, "None of the cases involved the problem of rights to subsurface oil and minerals." *Id.*, at 278.

The latter statement goes to the heart of the matter. There are no precedents which give the mineral rights to the owner of the right of way as against the United States. We would make a violent break with history if we construed the Act of 1862 to give such a bounty. We would, indeed, violate the language of the Act itself. To repeat, we cannot read "mineral lands" in § 3 as inapplicable to the right of way granted by § 2 and still be faithful to the standard which governs the construction of a statute that grants a part of the public domain to private interests.

*United States v. Union Pacific Railroad Co.*, *supra* at 119-20.

The opinion was emphatic on the distinction between a right-of-way

and land patented under sec. 3 of the Act of July 1, 1862. We find no indication that the Court defined right-of-way as only crossing even-numbered sections of land. The reasoning of the Court's opinion supports a contrary conclusion, *i.e.*, that the right-of-way under section 2 is subject to a mineral reservation to the United States in all circumstances.

Therefore, the patent which the railroad received to sec. 17 carried with it no interest or title in the right-of-way which had been located across the NW $\frac{1}{4}$  of that section. The interest which the railroad has in the right-of-way land stems solely from sec. 2 of the Act of July 1, 1862.

[3] The remaining question is whether the patentee of land which a right-of-way traverses acquired any interest in the minerals underlying the right-of-way. The Supreme Court has ruled that homesteaders of land traversed by a right-of-way granted by an act similar to the Act of July 1, 1862, received no interest in the right-of-way even though the homestead grant "was of the full legal subdivisions." *Northern Pacific Railway Co. v. Townsend*, *supra* at 270. Appellants argue that in *United States v. Union Pacific Railroad Co.*, *supra*, the Supreme Court limited the application of its earlier holdings to the surface estate and that title to the mineral estate under the right-of-way passed with the patent to the

subdivision traversed. In support of this position, they cite *Chicago and North Western Railway Co. v. Continental Oil Co.*, 253 F. 2d 468 (10th Cir. 1958). However, that decision is not applicable here because it was concerned with a right-of-way granted under the Act of March 3, 1875, 18 Stat. 482, 43 U.S.C. § 934 *et seq.* (1970).

As stated above, we do not agree with appellant's analysis of *United States v. Union Pacific Railroad Co.*, *supra*. Other courts and this Board have interpreted the Act of July 1, 1862, and the Supreme Court decisions to mean that title to oil and gas deposits underlying a right-of-way granted by the Act of July 1, 1862, remains in the United States. *George W. Zarak*, 4 IBLA 82 (1971), *aff'd sub nom. Rice v. United States*, 348 F. Supp. 254 (D.N.D. 1972), *aff'd per curiam*, 479 F. 2d 58 (8th Cir.), *cert. denied*, 414 U.S. 858 (1973); *Wyoming v. Udall*, 379 F. 2d 635 (10th Cir.), *cert. denied*, 389 U.S. 985 (1967); *see Kunzman v. Union Pacific Railroad Co.*, 169 Colo. 374, 456 P. 2d 743 (1969), *cert denied*, 396 U.S. 1039 (1970). Since title to the oil and gas remains in the United States, appellants have no title to assert, and the protest was properly dismissed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

JOAN B. THOMPSON,  
*Administrative Judge.*

I CONCUR:

DOUGLAS E. HENRIQUES,  
*Administrative Judge.*

# ADMINISTRATIVE JUDGE GOSS CONCURRING SPECIALLY:

The difficulties in setting forth a logical basis for the status of the law on the issues herein are set forth in detail in *United States v. Union Pacific Railroad Co.*, *supra* at 120-37 (Frankfurter, Burton and Harlan, J.J., dissenting) and *George W. Zarak*, *supra* at 89-93 (Steubing, A.J., concurring).

As an original proposition, I would have held that the railroad was intended by Congress to receive only an easement for the right-of-way under sec. 2 of the Act, and that the broad grant of the odd-numbered sections of land under sec. 3 of the Act was subject only to the railroad's interest in the right-of-way. Even though it has been determined that the easement would revert to the United States rather than to the servient owner, it would still follow that the servient owner received title to the minerals not conveyed by specific grant to the railroad.

Despite my own interpretation, however, the majority opinion in *Union Pacific*, *supra* at 115-20, leads me to conclude that the State Office decision should be affirmed by the Board.

JOSEPH W. GOSS,  
*Administrative Judge.*

## STEEL COMPANY

*March 17, 1976*UNITED MINE WORKERS OF  
AMERICA

v.

## INLAND STEEL COMPANY

6 IBMA 71

*Decided March 17, 1976*

Appeal by the United Mine Workers of America from an order by Chief Administrative Law Judge L. K. Luoma, dismissing an application for compensation in Docket No. VINC 76-19, filed by the United Mine Workers of America pursuant to sec. 110(a) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 820(a) (1970).

Affirmed.

Federal Coal Mine Health and Safety  
Act of 1969: Validity of Regulations

The Board, as delegate of the Secretary, has not been empowered to entertain a challenge to the validity of regulations promulgated by the Secretary pursuant to sec. 508 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 957 (1970) ; 43 CFR 4.1.

**APPEARANCES:** Steven B. Jacobson, Esq., for appellant, United Mine Workers of America; Richard R. Elledge, Esq., for appellee, Inland Steel Company.

MEMORANDUM OPINION BY  
ADMINISTRATIVE JUDGE  
SCHELLENBERGINTERIOR BOARD OF MINE  
OPERATIONS APPEAL

On Nov. 20, 1975, the United Mine Workers of America (UMWA)

filed an Application for Compensation on behalf of miners who were idled on June 21, 1975, as a result of the issuance of an imminent danger withdrawal order at Inland Steel Company's Inland Mine in Jefferson County, Illinois.

By order of Nov. 25, 1975, the Chief Administrative Law Judge (Chief Judge) dismissed the UMWA's application for lack of jurisdiction, since it was filed more than 3 months after the expiration of the filing period prescribed by the applicable regulation. That regulation (43 CFR 4.561) provides in pertinent part:

\* \* \* An application for compensation shall be filed within 45 days after the date of issuance of the withdrawal order which gives rise to the claim.

In its appeal to this Board, the UMWA acknowledges that the regulation, 43 CFR 4.561, was correctly interpreted by the Chief Judge but alleges only that the said regulation is invalid<sup>1</sup> and that, therefore, the dismissal should be vacated and the case remanded for hearing. Inland Steel Company points out that the regulation was promulgated under sec. 508 of the Federal Coal Mine Health and Safety Act of 1969 (the Act)<sup>2</sup> and contends that the Board is bound thereby and is not empowered to consider the validity of the regulation.

<sup>1</sup> Attached to the UMWA brief is a copy of a letter dated Nov. 21, 1975, in which UMWA requests the Secretary of the Interior to amend 43 CFR 4.561.

<sup>2</sup> 30 U.S.C. § 957 (1970).

The application for compensation was properly dismissed. It is well settled that government agencies must observe their own regulations promulgated in furtherance of the administration of an act of Congress.<sup>3</sup> Furthermore, this Board, as a delegate of the Secretary, is authorized to act only pursuant to published regulations, not in contravention thereof, and possesses no power to consider a challenge to the validity of regulations promulgated pursuant to sec. 508 of the Act.<sup>4</sup> Accordingly, the Chief Judge's order should be affirmed.

### ORDER

WHEREFORE, pursuant to the authority delegated to the Board of Mine Operations Appeals by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision in the above-captioned proceeding IS AFFIRMED.

HOWARD J. SCHELLENBERG, JR.,  
*Administrative Judge.*

I CONCUR:

DAVID DOANE,  
*Chief Administrative Judge.*

<sup>3</sup> See, for example, *Pacific Molasses Company v. Federal Trade Commission*, 356 F. 2d 386 (5th Cir. 1966), *United States v. Heffner*, 420 F. 2d 809 (4th Cir. 1970), and *United States v. McDaniels, et al.*, 355 F. Supp. 1082 (D.C. La. 1973).

<sup>4</sup> 43 CFR 4.1. See also, *Buffalo Mining Company*, 2 IBMA 226, at 245. 80 I.D. 630, 1973-1974 OSHD par. 16,618 (1973).

## KARST-ROBBINS COAL COMPANY, INC.

6 IBMA 78

Decided *March 22, 1976*

Appeal by the Mining Enforcement and Safety Administration from an order by Administrative Law Judge George H. Painter in Docket No. BARB 74-378-P, dismissing a petition for assessment of civil penalties brought under section 109 of the Federal Coal Mine Health and Safety Act of 1969.

Vacated and remanded.

### 1. Federal Coal Mine Health and Safety Act of 1969: Administrative Procedure: Defaults: Generally

Under 43 CFR 4.544, an Administrative Law Judge abuses his discretion in denying a motion to enter a default for failure to file an answer where the sole excuse for such failure is the Respondent's voluntary refusal to assign personnel or hire an attorney to perform that task.

### 2. Federal Coal Mine Health and Safety Act of 1969: Evidence: Adverse Witnesses

In a civil penalty proceeding brought pursuant to sec. 109(a)(3) of the Act, it is entirely proper for the Mining Enforcement and Safety Administration to call to the stand and examine the adverse party's principal witness and to rely upon such testimony in an effort to make out a prima facie case.

**APPEARANCES:** Thomas A. Mascolino, Esq., Assistant Solicitor, and John H. O'Donnell, Esq., Trial Attorney, for appellant, Mining Enforcement and Safety Administration.

*March 22, 1976*

*OPINION BY CHIEF  
ADMINISTRATIVE JUDGE  
DOANE*

*INTERIOR BOARD OF MINE  
OPERATIONS APPEALS*

The Mining Enforcement and Safety Administration (MESA) appeals from an order by Administrative Law Judge George H. Painter (Judge) in Docket No. BARB 74-378-P, dismissing a petition for assessment of civil penalties filed under sec. 109 of the Federal Coal Mine Health and Safety Act of 1969 (the Act) for failure to prove alleged violations of various mandatory standards under the Act. 30 U.S.C. § 819 (1970). MESA's principal claim of error, is that the Judge erred in denying a motion to enter a default under 43 CFR 4.544 on the ground that Karst-Robbins Coal Company (Respondent) showed good cause for its failure to answer as required by 43 CFR 4.541. The precise question before us is whether the Judge abused his discretion in so ruling. We hold that he did.

*Background*

On January 23, 1974, MESA filed a Petition for Assessment of Civil Penalty under the Act for numerous violations of mandatory health and safety standards, alleged to have occurred at the No. 2 Mine of Respondent, located at Holmes Mill, Harlan County, Kentucky. On Feb. 22, 1974, an Order was issued by the Chief Administrative Law

Judge extending the time within which Respondent was permitted to file an answer to and including Mar. 25, 1974. A similar Order was issued Apr. 1, 1974, reciting that Respondent had requested an additional extension on Mar. 28, 1974, and granting additional time to and including Apr. 19, 1974.

On June 19, 1974, no answer from Respondent having been received, an Order to Show Cause why it should not be held in default was issued to Respondent. By its terms, the Order required the showing to be made in writing and received by the Office of Hearings and Appeals (OHA) within 15 days. On July 11, 1974, 7 days after the due date, OHA received a letter dated July 9, 1974, purporting to respond to the Show Cause Order by requesting a hearing and explaining Respondent's failure to answer the petition as follows:

\* \* \* We regret that we were unable to respond to your previous notice of violation [sic], but due to the fact that we are a very small company, with limited personnel, we were unable to do so at that time. \* \* \*

A copy of that letter was never served upon MESA, or its counsel, as required by 43 CFR 4.509(a), and the Judge, apparently deeming the letter a satisfactory response to the Show Cause Order, ultimately scheduled a hearing in the matter for 1 p.m., June 10, 1975, at the Regency Hyatt House, Knoxville, Tennessee.

At the hearing, MESA presented no inspector as a witness because all

of the inspectors who issued the Notices of Violation involved in the proceeding had since left the employ of the Government. The only available witness was Mr. Karst, President of Respondent, who was sworn and called as an adverse witness by counsel for MESA. After Mr. Karst had testified generally as to the size and production capacity of Karst-Robbins, the Notice of Violation and Abatement (Government Exhibits G-1, G-70) were received into evidence.

At this point, the Judge advised counsel for MESA of the operator's letter in response to the Show Cause Order. On the ground that he had not been served with a copy of the letter, counsel for MESA moved that Respondent be held in default. 43 CFR 4.544. The Judge denied the motion and suggested that Mr. Karst, who was not represented by counsel, move to dismiss the proceedings since MESA could present no witnesses other than Mr. Karst to prove that the alleged violations occurred.<sup>1</sup> Mr. Karst moved to dismiss; the Judge granted the motion and adjourned the hearing. Subsequently, on July 23, 1975, the Judge issued a written Order dismissing the case because of MESA's failure to "present witnesses to establish the written evidence of safety violations." Nowhere does the record show the basis for the Judge's finding that Respondent's letter was a satisfactory response to

the Show Cause Order. A timely Notice of Appeal and Brief were filed by MESA. The Respondent, Karst-Robbins, has not participated in any way in this appeal.

### *Issues Presented*

1. Whether the Judge abused his discretion in denying the motion by MESA to enter a default against Respondent under 43 CFR 4.544.

2. Whether MESA may call for and rely upon the testimony of the principal witness of an adverse party in an effort to make out a prima facie case.

### *Discussion*

[1] While we are generally reluctant to overturn a discretionary determination with respect to a motion to enter a default, we are compelled to do so in this instance, because, in our view, the excuse proffered by the Respondent is manifestly unacceptable. If we allowed this precedent to stand on the basis of the above-quoted *conclusory* showing, we would invite other self-described "small" operators to avoid assigning personnel to the task of complying with simple procedural obligations required to assert their rights under the Act. These procedural obligations are essential to the hearing process and are part and parcel of the business of coal-mine health and safety litigation, now routine within the industry. While there may be a rare instance of an operator who is so pressed and poverty-stricken that it cannot timely answer a petition for assessment, the

<sup>1</sup> MESA did not raise the question of the propriety of the Judge's suggestion to Mr. Karst to move to dismiss.

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Respondent here has not made or proved such a claim, and its excuse, even if taken at face value, merely reveals a "convenient" allocation of its personnel resources. The Secretary's default regulation, 43 CFR 4.544, was designed to enforce a forfeiture of the hearing rights of an operator in just such a circumstance. To allow this kind of irregularity to pass unchallenged would be capricious, especially in view of all operators who do comply with their minimum procedural obligations and others who are routinely found to be in default despite the offer of more compelling excuses than the one advanced in this case. For these reasons, we conclude that the motion to enter default should have been granted, there having been no showing of good cause to do otherwise.

In addition, having decided to proceed to hearing, it might have been desirable for the Judge to at least have required an answer from the Respondent, albeit late, so that the parties could comprehend what issues were to be tried. An answer to the petition in this case was never filed.

[2] Before closing, we note that the Judge displayed considerable doubt about the propriety of permitting MESA to attempt to establish a prima facie case of violation based solely upon the testimony of the President of Respondent, Edward Karst. In our opinion, the Judge's doubt was without substance. In a civil proceeding, such as

this, it is conventional and acceptable trial practice for a plaintiff to call a defendant or a defendant's employee for examination as an adverse witness, even if the plaintiff must rely on such testimony as plaintiff's only evidence in the case. The fact that the testimony of such a witness is used exclusively in an effort to make out the petitioner's prima facie case in no way impairs the probative value of such evidence.

### ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), the order of dismissal in the above-captioned docket IS VACATED and this proceeding IS REMANDED to the Hearings Division with instructions to grant MESA's motion to enter a default, and to conduct further proceedings not inconsistent with the foregoing opinion.

DAVID DOANE,

*Chief Administrative Judge.*

I CONCUR:

HOWARD J. SCHELLENBERG, Jr.,  
*Administrative Judge.*

P & P COAL COMPANY

6 IBMA 86

Decided March 22, 1976

Appeal by the Mining Enforcement and Safety Administration from that part of a decision by Administrative Law Judge Richard C. Steffey (Docket

No. NORT 75-107-P), dated Oct. 23, 1975, dismissing a petition for assessment of civil penalty with respect to one alleged violation of a mandatory safety standard promulgated pursuant to authority in the Federal Coal Mine Health and Safety Act of 1969.

Reversed and remanded.

**1. Federal Coal Mine Health and Safety Act of 1969: Unavailability of Equipment, Materials, or Qualified Technicians: Pleading and Proof**

When a notice of violation or order of withdrawal is issued for failure to comply with a mandatory health or safety standard, there is a rebuttable presumption that required equipment, materials, and qualified technicians are available to the operator. 30 U.S.C. § 819(a) (1).

**2. Federal Coal Mine Health and Safety Act of 1969: Unavailability of Equipment, Materials, or Qualified Technicians: Pleading and Proof**

In a penalty proceeding involving an alleged failure to provide a methane monitor, the defense of unavailability of equipment is an affirmative defense which, to be sustained, must be pleaded and proved by the operator. 30 U.S.C. § 819(a) (1); 43 CFR 4.542.

**3. Federal Coal Mine Health and Safety Act of 1969: Administrative Procedure: Defaults: Affirmative Defenses**

In a default proceeding, an Administrative Law Judge errs by sua sponte raising an affirmative defense. 43 CFR 4.582.

**APPEARANCES:** Thomas A. Mascolino, Esq., Assistant Solicitor, and John H. O'Donnell, Esq., Trial Attorney, for appellant, Mining Enforcement and Safety Administration.

**OPINION BY CHIEF ADMINISTRATIVE JUDGE DOANE**

**INTERIOR BOARD OF MINE OPERATIONS APPEALS**

*Background*

On Apr. 3, 1972, a Mining Enforcement and Safety Administration (MESA) inspector issued Notice of Violation No. 1 CAG, pursuant to sec. 104(b) of the Federal Coal Mine Health and Safety Act of 1969 (Act).<sup>1</sup> The Notice was issued to P & P Coal Company (P & P) for a violation of 30 CFR 75.313 and contained the following description of the violative condition or practice:

A methane monitor for detecting concentrations of methane was not provided for the Wilcox continuous mining machine located on the West Mains working section.

On May 4, 1972, the time to abate this condition was extended on the ground that:

An order has been placed with Wilcox Manufacturing Co. but has not been received by the operator.

Subsequently, six further extensions of time to abate the condition were granted, the last of which allowed until May 27, 1973, to abate. On Apr. 4, 1973, a notice of termination was issued stating that:

The old Wilcox miner has been replaced with a new Wilcox miner, and a methane monitor was provided.

A petition for assessment of civil penalty was filed by MESA July 9, 1974, assigned Docket No. NORT

<sup>1</sup> 30 U.S.C. §§ 801-960 (1970).

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75-107-P, and included the charge set forth in the subject Notice of Violation. The Judge scheduled a hearing on the merits for Apr. 3, 1975, at Norton, Virginia, but P & P failed to appear. The hearing was then conducted pursuant to the default procedures set forth in the Department's regulation, 43 CFR 4.544(c).

Among other things in his decision dated October 23, 1975, the Judge found that methane monitors were impossible to obtain on Apr. 3, 1972, when Notice No. 1 CAG was issued, and then dismissed the Petition "insofar as it seeks assessment of a civil penalty for a violation of 30 CFR 75.313 with respect to Notice of Violation No. 1 CAG, dated Apr. 3, 1972."

In making the foregoing disposition, the Judge reached his conclusion for the following reasons: (1) although nothing was presented in the record to show that continuous mining machines with methane monitors were not available prior to the date when the operator received his new continuous miner, nothing was shown to establish that they were available; (2) since extensions were given for 1 year, the inspectors did not consider the failure to have the required methane monitor to be a serious deficiency; and (3) three Board decisions, hereinafter cited, when considered with the facts presented in the instant case, warrant a finding that P & P would not be required to defer opening of the mine until the methane monitor could be obtained.

MESA filed its Notice of Appeal and Brief with the Board on November 10, 1975, contending that the Judge's decision should be reversed with respect to the subject notice. P & P neither filed a brief nor otherwise participated in the appeal.

#### *Contentions of MESA on Appeal*

In its brief on appeal, MESA contends: First, that the evidence adduced was sufficient to support a finding of a violation of 30 CFR 75.313; next, that when an operator buys a continuous miner, it must comply with the regulations, and, therefore, an operator cannot purchase one that does not comply and be heard to claim no violation on the ground that the equipment necessary to assure its compliance with the mandatory standards is unavailable; and third, MESA alleges that it has established an "inference of availability" of the equipment which requires the burden to shift to the operator to show that it had been unable to acquire it. Additionally MESA suggests, while recognizing that it is not controlling on appeal, that a mine operator ought not be permitted to open a new mine before it has all the equipment necessary to comply with all mandatory health and safety standards.

#### *Issues Presented on Appeal*

Whether MESA has the burden to establish an inference of avail-

ability of equipment as part of its prima facie case.

Whether, in a penalty proceeding involving an alleged failure to provide a methane monitor, the defense of unavailability of equipment is an affirmative defense which, to be sustained, must be pleaded and proved by the operator.

Whether, in a default penalty proceeding, an Administrative Law Judge errs by sua sponte raising an affirmative defense and then requiring MESA to preponderate on that issue.

### *Discussion*

[1] The record reflects that both the Judge and MESA were under the impression that MESA had the burden to create an "inference of availability" of the equipment involved in the instant notice. This impression was, no doubt, created by the following language in *Buffalo Mining Company*, 2 IBMA 226, 80 I.D. 630, 1973-1974 OSHD par. 16,955 (1973) on page 272:

\* \* \* The matter of putting the burden of proving unavailability of equipment upon the operator applies only when there is an inference of availability established by the Government's evidence. \* \* \*

That part of the decision was intended to deal with the narrow question of whether evidence actually presented by MESA could be used to prove the contention of the operator of unavailability of equipment. To the extent that the above language or any other language in *Buffalo, supra*, indicates that there is not a presumption of availability of equipment, materials,

or qualified technicians in proceedings under the Act, it is hereby overruled. Therefore, MESA does not have the burden to establish any inference of availability as a necessary element of its prima facie case.

The record reveals that P & P took no part in the proceedings, that the Judge found that compliance was impossible due to unavailability, and that he dismissed the petition on that ground. The Judge and MESA did not consider the procedural questions of when that defense can be raised, and whether the Judge has authority to raise it sua sponte. These procedural questions must be resolved before the substantive disposition of this case can be made.

[2] The Judge relied upon the following three Board decisions in support of his proposition that P & P was not required to defer opening its mine until the methane monitor could be obtained: *Buffalo Mining Co., supra*; *Associated Drilling, Inc.*, 3 IBMA 164, 81 I.D. 285, 1973-1974 OSHD par. 17,813 (1974); and *Itmann Coal Co.*, 4 IBMA 61, 82 I.D. 96, 1974-1975 OSHD par. 19,427 (1975). In each of these cases the operator raised the issue of impossibility of compliance due to the unavailability of equipment, materials, or qualified technicians. In *Buffalo, supra*, we interpreted the intent of Congress to be that if compliance with the mandatory health or safety standard is impossible due to unavailability of equipment, materials, or qualified technicians, no sec. 104(b) notices

March 24, 1976

should be issued or a civil penalty assessed. These cases, in effect, stand for the proposition that impossibility of compliance is an absolute defense to a petition for assessment of civil penalties. We conclude, as a further refinement of the cases cited above, that this absolute defense is an affirmative defense. Therefore, such a defense to be sustained must be affirmatively pleaded and proved by an operator or be deemed waived.

[3] We do not question the prerogative of the Judge, even in a default proceeding, to require MESA to prove each element of a prima facie case. This does not mean, however, that in a default proceeding he may inquire into matters pertaining to an affirmative defense, as he did in the instant case. We hold, therefore, that he erred by doing so, particularly in light of our foregoing clarification of the language in *Buffalo, supra*.

### ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Judge's decision in the above-captioned case, pertaining to Notice No. 1 CAG, dated Apr. 3, 1972, Docket No. NORT 75-107-P, IS REVERSED and the proceeding REMANDED so that the Judge may, in accordance with the opinion herein ex-

pressed, determine whether the violation occurred and, if so, the appropriate amount of penalty to be assessed.

DAVID DOANE,

*Chief Administrative Judge.*

I CONCUR:

HOWARD J. SCHELLENBERG, JR.,  
*Administrative Judge.*

### APPEAL OF BOOZ, ALLEN & HAMILTON, INC.

IBCA-1027-3-74

Decided March 24, 1976

Contract No. 68-1-0770, Environmental Protection Agency.

Sustained in Part.

Contracts: Construction and Operation: Government Furnished Property—Contracts: Formation and Validity: Cost-type Contracts—Contracts: Performance or Default: Waiver and Estoppel

A cost-plus-fixed-fee contractor's claim for costs in excess of the estimated cost of the contract, incurred in correcting deficiencies in Government-furnished property, was denied where the contractor knew or should have known that costs being incurred would exceed the estimated cost, but failed to give the notice required by the Limitation of Cost clause and the evidence failed to furnish any basis for excusing the contractor's failure to give the required notice. The contractor's claim for additional fee on the extra work was sustained since the Limitation of Cost clause is not applicable to such claims.

**APPEARANCES:** Messrs Kenneth J. Wees, C. G. Appleby, Corporate Attorneys, Washington, D.C., for the appellant; Mr. Edward C. Gray, Government Counsel, Washington, D.C., for the Government.

*OPINION BY ADMINISTRATIVE JUDGE NISSEN*

*INTERIOR BOARD OF CONTRACT APPEALS*

This appeal involves an overrun in estimated costs under a cost-plus-fixed-fee contract. The appeal has been submitted for decision on the basis of the written record consisting of the appeal file, pleadings, a stipulation of facts and briefs of the parties. In accordance with the agreement of the parties, only the issue of entitlement is before the Board.

*Findings of Fact*

The contract,<sup>1</sup> entered into as of Oct. 2, 1972, included estimated costs of \$107,280 and a fixed fee of \$9,120 for a total of \$116,400, and called for Studies of Economic Impact of Pollution Control Requirements upon Marketing Oriented Industries which were listed as inorganic chemicals, textiles, beverages and motor vehicles. The contract provided that the Environmental Protection Agency (EPA) would provide the contractor with

three kinds of information: "pollution control cost information, pollution abatement technology information and previous economic studies. The pollution control cost information to be provided includes basic assumptions concerning required levels of control implementation timetables, etc." Included in the General Provisions of the contract were Clause 11, Government Property<sup>2</sup> and Clause 20, Limitation of Cost.<sup>3</sup>

<sup>2</sup> The Government Property clause provides in pertinent part:

"(a) Government-Furnished Property. The Government shall deliver to the Contractor, for use in connection with and under the terms of this contract, the property described as Government-furnished property in the Schedule or specifications, together with such related data and information as the Contractor may request and as may reasonably be required for the intended use of such property (hereinafter referred to as 'Government-furnished property'). The delivery or performance dates for the supplies or services to be furnished by the Contractor under this contract are based upon the expectation that Government-furnished property suitable for use will be delivered to the Contractor at the times stated in the Schedule or, if not so stated, in sufficient time to enable the Contractor to meet such delivery or performance dates. In the event that Government-furnished property is not delivered to the Contractor by such time or times, the Contracting Officer shall, upon timely written request made by the Contractor, make a determination of the delay, if any, occasioned the Contractor and shall equitably adjust the estimated cost, fixed fee, or delivery or performance dates, or all of them, and any other contractual provisions affected by any such delay, in accordance with the procedures provided for in the clause of this contract entitled 'Changes.' In the event that Government-furnished property is received by the Contractor in a condition not suitable for the intended use, the Contractor shall, upon receipt thereof notify the Contracting Officer of such fact and, as directed by the Contracting Officer, either (i) return such property at the Government's expense or otherwise dispose of the property or (ii) effect repairs or modifications. Upon completion of (i) or (ii) above, the Contracting Officer upon written request of the

<sup>1</sup> Appeal file, tab 2. Although the award was to Booz, Allen Public Administration Services, Inc., the appeal has been processed under the name of Booz, Allen & Hamilton, Inc. It appears that Booz, Allen Public Administration Services, Inc., is a subsidiary of Booz, Allen & Hamilton, Inc.

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Although appellant was notified of the award by letter dated Oct. 2, 1972 (Appeal file, tab 1), the formal contract was not forwarded to appellant for signature until Oct. 10, 1972, at which time the contract had not been signed by the contracting officer (Stipulation, par. 1). The letter of Oct. 10, 1972 (Stipulation, Exh. A), transmitting copies of the contract included the following: "The Government is in no way liable under the proposed contract until such time as the contract document has been fully executed by the Contracting Officer." A fully executed copy of the contract was forwarded to appellant under date of Oct. 19, 1972 (Stipulation, Exh. B).

Contractor shall equitably adjust the estimated cost, fixed fee, or delivery or performance dates, or all of them, and any other contractual provision effected by the return or disposition, or the repair or modification in accordance with the procedures provided for in the clause of this contract entitled 'Changes.' The foregoing provisions for adjustment are exclusive and the Government shall not be liable to suit for breach of contract by reason of any delay in delivery of Government-furnished property or delivery of such property in a condition not suitable for its intended use.

"(b) Changes in Government-furnished Property:

(1) By notice in writing, the Contracting Officer may (i) decrease the property furnished or to be furnished by the Government under this contract, and/or (ii) substitute other Government-owned property for property to be furnished by the Government, or to be acquired by the Contractor for the Government, under this contract. The Contractor shall promptly take such action as the Contracting Officer may direct with respect to the removal and shipping of property covered by such notice.

"(2) In the event of any decrease in or substitution of property pursuant to paragraph (1) above, or any withdrawal of authority to use property provided under any other contract or lease, which property the

An interim report of the results of appellant's studies and analyses was due within 30 days after initiation of the contract and a final report was due within 60 days after initiation of the contract. Both the interim and final reports were to be followed by oral presentations to EPA. Fifty copies of the finished version of the report were to be submitted within 80 days after initiation of the contract.

The Government-furnished property (GFP) was delivered to appellant on or about Oct. 9, 1972. Deficiencies were found in the GFP by personnel of Appellant and the Government during the period approximately Oct. 9 through Nov. 10,

Government had agreed in the Schedule to make available for the performance of this contract, the Contracting Officer, upon the written request of the Contractor (or, if the substitution of property causes a decrease in the cost of performance, on his own initiative), shall equitably adjust such contractual provisions as may be affected by the decrease, substitution or withdrawal, in accordance with the procedures provided for in the 'Changes' clause of this contract."

<sup>3</sup> The Limitation of Cost clause is as follows:

"(a) It is estimated that the total cost to the Government for the performance of this contract, exclusive of any fee, will not exceed the estimated cost set forth in the Schedule and the Contractor agrees to use his best efforts to perform the work specified in the Schedule and all obligations under the contract within such estimated cost. If, at any time, the Contractor has reason to believe that the cost which he expects to incur in the performance of this contract in the next succeeding sixty (60) days, when added to all costs previously incurred, will exceed seventy-five percent (75%) of the estimated cost set forth in the Schedule, or if, at any time, the Contractor has reason to believe that the total cost to the Government for the performance of his contract, exclusive of any fee, will be greater or substantially less than the then

1972 (Stipulation, Par. 4). The process of finding deficiencies was a continuous one, occurring throughout the mentioned period. Personnel of the Government and appellant endeavored to remedy the deficiencies and Government personnel were aware that Appellant was performing substantial work in this regard.

Under date of Nov. 7, 1972 (Stipulation, Exh. D), Appellant delivered interim reports to the Government. The letter stated that the focus of Appellant's efforts during the initial phase of the study has been on data collection and included in pertinent part:

estimated cost, hereof, the Contractor shall notify the Contracting Officer in writing to that effect, giving the revised estimate of such total cost for the performance of this contract.

"(b) Except as required by other provisions of this contract specifically citing and stated to be an exception of this clause, the Government shall not be obligated to reimburse the Contractor for costs incurred in excess of the estimated cost set forth in the Schedule, and the Contractor shall not be obligated to continue performance under the contract (including actions under the Termination Clause) or otherwise to incur costs in excess of the estimated cost set forth in the Schedule, unless and until the Contracting Officer shall have notified the Contractor in writing that such estimated cost has been increased and shall have specified in such notice a revised estimated cost which shall thereupon constitute the estimated cost of performance of this contract. No notice, communication or representation in any other form or from any person other than the Contracting Officer shall affect the estimated cost of this contract. In the absence of the specified notice, the Government shall not be obligated to reimburse the Contractor for any costs in excess of the estimated cost set forth in the Schedule, whether those excess costs were incurred during the course of the contract or as a result of termination. When and to the extent that the estimated cost set forth in the Schedule has been increased, any costs incurred by the

\* \* \* At this time, only a limited quantity of usable data has been acquired relative to production facilities and water pollution abatement costs in the Motor Vehicle Manufacturing Industry. The reasons for this are as follows:

Plant descriptions contained in generally available data sources are not adequate for purposes of this study. Producers will make more detailed data available to us during the second phase of the study.

The water pollution abatement cost estimates on which the study is to be based appear at this time to be inadequate for the following reasons:

Plant configurations are in most cases significantly different from those assumed in preparing water pollution abatement cost estimates.

Water usage rates at plants of interest are in many cases significantly higher per unit of output than has been assumed

Contractor in excess of the estimated cost prior to such increase shall be allowable to the same extent as if such costs had been incurred after the increase; unless the Contracting Officer issues a termination or other notice and directs that the increase is solely for the purpose of covering termination or other specified expenses.

"(c) If (1) the Contractor stops performance before completion of all work hereunder because it has incurred costs in the amount of or in excess of the estimated cost set forth in the contract, and (2) the Contracting Officer elects not to increase such estimated costs, the Contractor's fixed-fee will be equitably reduced to reflect the actual amount of work performed as compared with the full amount of the work required in the contract. In the event of failure to agree as to the amount of such reduction, the Contracting Officer shall determine the amount, subject to the right of the Contractor to appeal therefrom pursuant to the clause in the contract entitled 'Disputes.' This paragraph shall not, in any way, limit the rights of the Government under the clause in the contract entitled 'Termination for Default or for the Convenience of the Government.'

"(d) Change orders issued pursuant to the 'Changes' clause of this contract shall not be considered an authorization to the Contractor to exceed the estimated cost set forth in the Schedule in the absence of a statement in the Change order, or other contract modification, increasing the estimated cost."

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in preparing cost estimates. The contributing factors are plant configurations, manufacturing processes and water handling methods used.

At our meeting of Friday, Nov. 10, we will be prepared to discuss in detail:

The level and reliability of analysis feasible given the Motor Vehicle Industry cost estimates available.

Work steps required to generate adequate cost estimates[.]

Although the foregoing letter is limited to deficiencies in property (data) concerning the Motor Vehicle Industry, the stipulation (Par. 5) is not so limited, stating “\* \* \* the Government was advised that a substantial portion of the Government-furnished property was insufficient and not suited for use in conducting the studies, and that additional work was required to overcome the deficiencies in Government-furnished property in order to complete the studies.” The Board finds that GFP concerning the other industries involved in the study was also unsuitable for use and that the Government was so advised (Par. 6 of Amended Complaint, which has been admitted by the Government).

Appellant delivered draft copies of its final reports to the Government on Dec. 4, 1972. Thereafter, the Government offered comments on the draft and Appellant revised its final reports. The final reports were delivered to the Government on Jan. 5, 1973.

Appellant submitted a voucher covering costs for the period ending Oct. 31, 1972, in the amount of \$33,-

532.89, including fixed fee of \$2,-001.51, on Dec. 13, 1972 (Tab. 5A). A second voucher covering costs through Nov. 30, 1972, in the amount of \$58,198.67<sup>4</sup> including fixed fee of \$2,413.60 was submitted on Jan. 4, 1973 (Tab. 5B). The record does not reflect whether Appellant invoiced and has been paid for the balance of the estimated costs of the contract and the remainder of the fixed fee.

In a letter to the Contracting Officer, dated July 10, 1973 (Tab. 3), Appellant detailed the deficiencies in the GFP and the efforts expended in overcoming the deficiencies. Citing the Government Property and Changes<sup>5</sup> clauses, appellant requested that total estimated costs of the contract be increased from \$107,280 to \$137,825 or a total of \$30,545 and that the fixed-fee be increased by \$2,597 from \$9,120 to \$11,717. Costs and fixed fee claimed thus total \$33,142.

<sup>4</sup> Costs and fixed fee listed on page 2 of the voucher total \$59,756.68. The difference of \$1,558.01 between that figure and the amount invoiced is not explained.

<sup>5</sup> Clause 3, Changes, appears to be a variation of that prescribed by the Department of Defense for Time and Material and Labor Hour contracts (32 CFR 7.901-2) and is as follows:

“The Contracting Officer may at any time, by a written order, and without notice to the sureties, if any, make changes, within the general scope of this contract, in any one or more of the following: (i) Drawings, designs, specifications or statement of work, (ii) method of shipment or packing, (iii) place of inspection, delivery, or acceptance, and (iv) the amount of Government-furnished property. If any such change causes an increase or decrease in the cost of, or the time required for performance of this contract or otherwise affects any other provisions of this

EPA responded (letter dated Aug. 1, 1973, Tab. 4A), pointing out that appellant's letter was not considered to be a prompt notice under the Changes, Government Property or Limitation of Cost clauses. It was further pointed out that the file did not reflect notice that appellant expected to exceed the estimated cost was given, or that the Contracting Officer directed repair of the Government property or that appellant was directed to exceed the estimated cost. Appellant replied (letter dated Sept. 27, 1973, Tab. 4B), alleging that compliance with the procedural requirements of the Government Property (GP) clause was impossible in the time available, that the Government was fully aware of the facts concerning the defective property and citing cases<sup>6</sup> in support of its contention that noncompliance with notice provisions of the GP

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contract, whether changed or not changed by any such order, an equitable adjustment shall be made (i) in the contract price or time of performance, or both, and (ii) in such other provisions of the contract as may be so affected, and the contract shall be modified in writing accordingly. Any claim by the Contractor for adjustment under this clause must be asserted within thirty (30) days from the date of receipt by the Contractor of the notification of change; provided, however, that the Contracting Officer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled 'Disputes.' However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed."

<sup>6</sup> Among others, *Hoel-Steffen Construction Company v. United States*, 197 Ct. Cl. 561 (1972) and *Lockheed Aircraft Corporation*, ASBCA No. 9396 (February 26, 1965), 65-1 BCA par. 4689.

and Changes clauses was not fatal to its claim. With respect to the LOC clause, appellant argued that this clause was inapplicable to constructive change orders and to claims based on the repair of Government property with the knowledge and acquiescence of the Government.

Asserting that a review of overhead rates applicable to work performed in the fiscal year ending Sept. 30, 1973, indicated that some adjustments were in order (namely, an increase in overhead from the 65 percent proposed to the actual rate of 74.1 percent and a slight reduction in G & A from 15 percent to 13.9 percent), appellant increased its claim for costs incurred in correcting Government property by \$853 from \$30,545 to \$31,398 and its claim for fee on the extra work by \$72 from \$2,597 to \$2,669. Alleging that this increase in overhead rates was impossible to predict, appellant asserted that it was entitled to this increase in overhead on the basic work and requested a further increase in the estimated costs of the contract by \$1,827.<sup>7</sup>

Thereafter, a meeting was held to discuss the claim, and appellant submitted further arguments (letter dated Feb. 19, 1974, Tab. 4E) in support of the claim. The Contracting Officer's final decision of Feb. 19, received by the appellant on Feb. 25, 1974, denied the claim, princi-

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<sup>7</sup> This claim has since been abandoned (memorandum of prehearing conference of April 8, 1975). Appellant presently asserts entitlement to an increase in the estimated cost of \$31,398 and an increase in fee of \$2,669 (Amended Complaint).

*March 24, 1976*

pally for lack of compliance with the notice required by the LOC clause. This timely appeal followed.

Based on a stipulation executed by counsel for the parties on Oct. 29, 1975, the Board finds that appellant had or should have had sufficient knowledge throughout the performance of the contract of costs incurred, and that Appellant knew or should have known, when costs incurred in contract performance, which added to costs previously incurred, exceeded the estimated cost stated in the contract. Contrary to appellant's argument, we find that although the Government was aware that appellant was performing extra work on the GFP, the record will not support a finding that the Government knew or should have known of the overrun.<sup>8</sup> The Board further finds that appellant

<sup>8</sup> As support for such a finding, appellant relies primarily upon internal EPA memoranda dated subsequent to the filing of the claim, which were referred to in the stipulation, but not included in the Board's copy of the appeal file. These memoranda have now been supplied and only the memorandum of August 9, 1973, from the Chief of Contract Operations to the Deputy Assistant Administrator for Planning and Evaluation is significant. This memorandum expresses a continuing need to contract for studies of the economic impact of pollution control requirements on various industries, states that some contractors have expressed concern about the suitability of data furnished for use in the studies and includes the following: "If the data furnished as government furnished property is not suitable for its intended use, the contract may not be able to be performed at all, as well as necessary, on time or within the total estimated cost." While the memorandum expresses obvious conclusions as to the possible consequences of unsuitable GFP, it may not be construed as an admission that the contracting officer or responsible EPA officials were aware of the overrun experienced by appellant.

did not at any time prior to completion of contract performance or prior to incurring costs in excess of the estimated cost of the contract, make any request, in writing or otherwise, to any EPA office, officer or employee, for an increase in the estimated cost of the contract or advise any EPA office, officer, or employee that costs incurred in performing the contract had exceeded, might exceed or would exceed the specified estimated cost of the contract. Except for the payment vouchers referred to previously, appellant did not during the period of contract performance furnish the Government information concerning costs incurred under the contract or the estimated costs required for completion of performance. Based on the stipulation, we find that appellant did not during the period of contract performance make any request of any type to any EPA office, officer or employee for any modification of the contract's terms or furnish in any manner any indication that appellant believed it was entitled to an equitable adjustment of any kind under the contract.

The Board further finds that appellant did not receive any written notice from the contracting officer that the estimated cost of the contract had been, would be or might be increased or receive any notice or statement, in any form, from any EPA office, officer or employee that the estimated cost of the contract had been, would be or might be in-

creased. Appellant, prior to the award of the contract involved in this appeal, has had many other cost-type Government contracts containing the LOC clause.

### *Decision*

Appellant argues that a direction, pursuant to Paragraph (a) of the GP clause, which is not required to be in writing, to repair or modify GFP is not necessarily a change order and asserts that the LOC clause should be held inapplicable to work performed under the GP clause for the same reason that the LOC clause was held inapplicable to changes<sup>9</sup> prior to its modification to specifically include changes. Appellant emphasizes that the contractor's request for an equitable adjustment under the GP clause follows either return of or repair or modification of the GFP and that the reference in the GP clause is " \* \* in accordance with procedures in the clause of this contract entitled 'Changes.'" Appellant asserts that there are only two procedures in the Changes clause which can reasonably be construed as applicable to a claim for an equitable adjustment for correcting deficient GFP; one, is the requirement that the contract be modified in writing to reflect the equitable adjustment and two, the Disputes clause is made

applicable in case there is a failure to agree to any adjustment.

The Government argues that additional work required to correct deficiencies in GFP is to be treated, for purposes of calculation of equitable adjustments, as if it were ordered under the Changes clause and that since the LOC clause specifically applies to changes, the LOC clause necessarily operates to bar the instant claim. Appellant recognizes the validity of this argument, at least in part, for it now contends (Reply Brief, p. 5) that the GP clause stops short of citing the Changes clause for any other purpose than to provide a mechanism for calculating equitable adjustments.

We agree with appellant's contention to the effect that the GP clause is an independent adjustment provision<sup>10</sup> and consider that this would be so absent reference therein to procedures of the Changes clause.<sup>11</sup> We also recognize that the language expressly subjecting actions under the Termination and

<sup>9</sup> Paragraph (a) of the GP clause providing in pertinent part that "Upon completion of (i) or (ii) above [return of or repair or modification of GFP] the Contracting Officer upon written request of the Contractor shall equitably adjust the estimated cost, fixed fee, or delivery or performance dates, or all of them, and any other contractual provision effected by the return or disposition or repair or modification \* \* \*" does not differ appreciably from the Changes clause used in cost reimbursement-type contracts under which the LOC clause was consistently held inapplicable to changes (note 9, *supra*).

<sup>11</sup> The Government and appellant appear to agree that the reference in the GP clause to procedures of the Changes clause is for the purposes, *inter alia*, of providing a mechanism for calculating equitable adjustments. However, the GP clause uses the term "equitably

<sup>8</sup> See, e.g., *Chemical Construction Corporation*, IBCA-946-1-72 (Feb. 8, 1973), 73-1 BCA par. 9892. See also, *bolt, Beranek & Newman, Inc.*, ASBCA No. 14655 (May 25, 1971), 71-1 BCA par. 8899 at 41,356 "When the contractually specified change [adjustment] is made in the estimated cost, there is pro tanto, no overrun."

March 24, 1976

Changes clauses to the restrictions of the LOC clause together with the absence of any reference in the LOC clause to the GP clause, might be regarded as creating an ambiguity as to the application of the LOC clause to the GP clause.<sup>12</sup> However, we conclude that neither the first proposition which we have accepted as valid, nor the second, which is merely arguable, afford an adequate basis for holding the LOC clause inapplicable to the instant cost overrun.

Paragraph (b) of the LOC clause provides in part:

Except as required by other provisions of this contract specifically citing and stated to be an exception of this clause, the Government shall not be obligated to reimburse the Contractor for costs incurred in excess of the estimated cost set forth in the Schedule, and the Contractor shall not be obligated to continue performance under the contract (including actions under the Termination Clause) or otherwise to incur costs in excess of the estimated cost set forth in the Schedule, unless and until the Contracting Officer shall have notified the Contractor in writing that such estimated cost has

adjust" which has been accepted as tied to, or synonymous with, reasonable increases or decreases in the contractor's cost. See *General Builders Supply Co., Inc. v. United States*, 187 Ct. Cl. 477 (1969).

<sup>12</sup> While appellant has not contended that any such ambiguity exists, we note the Changes clause in the instant contract (note 5, *supra*) specifically permits changes in the amount of GFP, but does not address the matter of unsuitable or defective GFP. See in this regard *Douglas Aircraft Company, Inc.*, ASBCA No. 10495 (Dec. 16, 1966), 66-2 BCA 6049 (ambiguity as to the applicability of a Limitation of Government Obligation clause to the Changes clause was resolved in part by the conduct of the parties, resulting in a holding the LOGO clause was inapplicable to changes).

been increased and shall have specified in such notice a revised estimated cost which shall thereupon constitute the estimated cost of performance of this contract. \* \* \* In the absence of a specified notice, the Government shall not be obligated to reimburse the Contractor for any costs in excess of the estimated cost set forth in the Schedule, whether those excess costs were incurred during the course of the contract or as a result of termination. \* \* \*

The quoted provisions are, in our opinion, sufficiently all encompassing to subject terminations and changes to the restrictions of the LOC clause even if they were not specifically mentioned therein.<sup>13</sup> While we have determined that the GP clause is an independent adjustment provision and it is not specifically referred to in the LOC clause, the GP clause is clearly not stated to be an exception to the LOC clause.<sup>14</sup> In addition, the written notice referred to in the latter of the quoted sentences from the LOC clause is a notice increasing the estimated cost of the contract and, in the absence of this notice, the estimated cost set forth in the schedule controls the Government's obligation regardless of whether the claimed costs in ex-

<sup>13</sup> See, e.g., *Pickard & Burns Electronics*, ASBCA No. 12736 (July 17, 1968), 68-2 BCA par. 7149 (former version of LOC clause held applicable to termination even though termination clause not expressly cited in LOC clause). See also, *Breed Corporation*, ASBCA Nos. 14523, 15163 (Jan. 24, 1972), 72-1 BCA par. 9304 and cases cited.

<sup>14</sup> See *Dynamics Research Corporation*, ASBCA No. 18326 (Jan. 9, 1974), 74-1 BCA par. 10,425. See also, *John I. Thompson Company*, ASBCA No. 17462 (Dec. 10, 1973) 73-2 BCA par. 10,412, concurring opinion at 49,216-217. The result was different under a prior version of the LOC clause, *Thiokol Chemical Corp.*, ASBCA No. 5726 (Nov. 16, 1960) 60-2 BCA par. 2852.

cess thereof were incurred during the course of the contract or as a result of termination.

Faced with such clear and explicit requirements, it would be anomalous indeed if the LOC clause were held inapplicable to costs incurred in correcting defective or unsuitable GFP. We think it not without significance that appellant initially asserted its claim under the GP and Changes clauses and that there is a long and well-established practice of treating defective or late delivery of GFP (the GP clause containing similar or identical language referring to an equitable adjustment in accordance with procedures of the Changes clause) as similar to or as if they were changes.<sup>15</sup> It is, of course, well settled that such long-standing practices may have controlling weight in determining the meaning or effect of contract clauses.<sup>16</sup> We are convinced from a

reading of the contract as a whole that there were intended to be no exceptions to the LOC clause. There is no evidence of conduct of the parties which would support a contrary conclusion. Accordingly, we hold that the LOC clause must be held applicable to costs incurred in correcting unsuitable or defective GFP.

Having held the LOC clause applicable to work performed in identifying and correcting defective GFP under the GP clause, we turn to appellant's alternative arguments that appellant's failure to give the required notice under the LOC clause should be excused and that the Government should be held to have waived its discretion to refuse to fund the overrun. These arguments are essentially that the Government was quickly made aware of the deficiencies in the GFP, that under the circumstances this knowledge must be imputed to the contracting officer, that, in any event, the Government was notified in writing of the deficiencies in the GFP, that the Government was aware of the deficiencies and was aware that the deficiencies were causing appellant to perform substantial extra work and that the Government knew that the extra work would result in the incurrence of costs in addition to the estimated cost. Appellant also relies on the fact that the contract was sent to appellant after approximately one-

<sup>15</sup> See, e.g., *L.T.H. Manufacturing Company*, ASBCA Nos. 1331 and 1367 (July 6, 1953) (Government's delay in delivery of GFP similar to a change); *Cornelia Garment Company*, ASBCA No. 1673 (Aug. 20, 1954) (contractor entitled to equitable adjustment under articles 2 (Changes) and 29 (GFP)); *Terry Industries, Inc.*, ASBCA No. 3634 (Apr. 27, 1959), 59-1 BCA par. 2193 (failure of contracting officer to issue a written change justified rejection of Government's contention claim under GFP clause was untimely); and *S.S. Mullen, Inc. v. United States*, 182 Ct. Cl. 1-22 (1968) at 8-9 (adjustment for GFP which was not suitable for its intended use is to be made under Changes article). Cf. *Tru-Fit Trousers*, ASBCA Nos. 5788, 6063 (Apr. 25, 1960), 60-1 BCA par. 2615 (even though GFP clause did not provide for a price adjustment for unsuitable GFP, directive to use defective GFP would be considered a change).

<sup>16</sup> *United States v. Utah Construction and Mining Company*, 384 U.S. 394 (1966) (scope of Disputes clause); *General Builders Supply Co., Inc. v. United States*, note 11, *supra*

(equitable adjustment as excluding anticipatory profits) and 44 Comp. Gen. 200 (1964) (application of Fulford doctrine).

March 24, 1976

third of the 2-month performance period had expired, that appellant did not receive any instructions concerning GFP until approximately one-half of the performance period had elapsed,<sup>17</sup> and argues that any notice required from appellant and any notices needed from the Government should not apply retroactively to costs incurred or actions taken prior to receipt of the contract and the mentioned instructions. Appellant further asserts that the Government received the direct benefit of work performed by appellant in correcting deficiencies in GFP and that there is no evidence that the Government was prejudiced by the lack of notice.

Although, based on the stipulation, we have found that the process of finding deficiencies in GFP was a continuous one occurring throughout the period Oct. 9 through Nov. 9, 1972, Appellant has abandoned any contention that giving the notice required by Paragraph (a) of the LOC clause was impossible.<sup>18</sup> Indeed, appellant has stipulated and we have found that Appellant knew or should have known when costs incurred in contract performance,

which added to costs previously incurred, exceeded the estimated cost stated in the contract. We have also found that although the Government was aware that Appellant was performing substantial additional work in correcting GFP, the record would not support a finding that the Government knew or should have known that costs incurred exceeded the estimated cost of the contract.

Although we find it anomalous that the Government, under a contract with such a short performance schedule, in forwarding the contract to appellant for signature on Oct. 10, 1972, advised appellant that the Government was not liable under the proposed contract until it was executed by the contracting officer (the executed contract was returned to the contractor under date of Oct. 19, 1972), the foregoing findings dispose of appellant's contention that the Government has waived its discretion to refuse to fund the overrun. This is so because absent unforeseeability or impossibility (note 18, *supra*), the cases finding the Government obligated to fund an overrun are dependent upon actions of responsible Government officials, *e.g.*, urging continued performance or demanding and accepting the benefits of performance, with knowledge of the overrun.<sup>19</sup> Even the contracting officer's knowledge of the overrun could not impose upon the Government the Hobson's choice of surrendering title to

<sup>17</sup> This is based upon a letter (Stipulation, Exh. C) dated Nov. 6, 1972, from the Property Administrator which enclosed a "Guide for Control of Government Property by Contractors" and informed appellant that if it had any questions concerning property it should contact that office.

<sup>18</sup> Where a contractor has no reason to foresee an overrun through no fault attributable to it, giving of the specified notice will be excused based upon the theory the Government has assumed the risk of such unforeseeability or impossibility. *General Electric Company*, ASBCA No. 18980 (May 13, 1975), 75-1 BCA par. 11,287.

<sup>19</sup> See *Breed Corporation* (note 13, *supra*), and cases cited.

Government-owned property or paying for nonseverable increments thereto which the contractor had added with full knowledge that it had incurred a cost overrun.<sup>20</sup> It follows that appellant has failed to show a basis for holding the LOC clause inapplicable or for imposing an obligation upon the Government to fund costs in excess of the estimated cost set forth in the contract notwithstanding noncompliance with the LOC clause. Accordingly, appellant's claim for the cost overrun must be denied.

The LOC clause is not applicable, however, to claims for increased fee which are properly computed upon changes to the work or work otherwise not contemplated by the contract as written.<sup>21</sup> Appellant having performed substantial additional work in correcting deficient GFP under circumstances wherein the contracting officer must be deemed to have knowledge thereof,<sup>22</sup> the lack of strict compliance with notice requirements of the GP and Changes clauses is not a bar to the

claim for additional fee.<sup>23</sup> Accordingly, the appeal is sustained as to the claim for additional fee and in accordance with the agreement of the parties remanded to the contracting officer for negotiation of the amount due.

### *Conclusion*

The appeal is denied in part and sustained in part as indicated.

SPENCER T. NISSEN,  
*Administrative Judge.*

I CONCUR:

WILLIAM F. MCGRAW,  
*Chief Administrative Judge.*

EDWARD MALZ

24 IBLA 251

Decided *March 26, 1976*

Appeal from decision of the Eastern States Office, Bureau of Land Management, denying reinstatement of oil and gas lease ES-11658, terminated by operation of law for failure to pay the annual rental on or before the due date.

**Affirmed.**

### **1. Oil and Gas Leases: Reinstatement**

Under 30 U.S.C. § 188(c) (1970), the Secretary of the Interior has no authority to reinstate an oil and gas lease terminated by operation of law for failure to make timely payment of rental, unless the rental payment is tendered at the proper office within 20 days of the due date.

<sup>23</sup> *Lockheed Aircraft Corporation* (note 6, *supra*); *U.S. Federal Engineering & Manufacturing, Inc.*, ASBCA No. 19909 (Oct. 8, 1975), 75-2 BCA par. 11,578.

<sup>20</sup> *Pickard & Burns Electronics and Breed Corporation* (note 13, *supra*).

<sup>21</sup> See *Franklin W. Peters and Associates*, IBCA-762-1-69 (Dec. 28, 1970), 77 I.D. 213, 71-1 BCA par. 8615. Cf. *The Magnavox Company*, ASBCA No. 17455 (Feb. 22, 1974), 74-1 BCA par. 10,495 (claim for increased fee denied because of Limitation of Government Liability clause which specifically included fee).

<sup>22</sup> We think this conclusion follows from the fact that the process of finding deficiencies in the GFP was continuous, that personnel of Appellant and the Government endeavored to correct the deficiencies, that the Government was aware Appellant was performing substantial additional work correcting deficiencies, and from Appellant's letter of November 7, 1972, detailing deficiencies in GFP concerning the Motor Vehicle Industry.

**2. Oil and Gas Leases: Reinstatement—  
Waiver**

Cashing of an oil and gas rental check, received more than 20 days after due, does not constitute a waiver which would permit reinstatement of a terminated lease in violation of 30 U.S.C. § 188(c) (1970), despite wording on the check that "by endorsement this check when paid is accepted in full payment \* \* \*."

**APPEARANCES:** Edward Malz, Esq.,  
New York, New York, pro se.

**OPINION BY ADMINISTRATIVE  
JUDGE GOSS****INTERIOR BOARD OF LAND  
APPEALS**

Edward Malz appeals from a decision dated Sept. 19, 1975, by Eastern States Office, Bureau of Land Management, denying his petition for reinstatement of oil and gas lease ES-11658, terminated by operation of law for failure to make timely payment of rental.

The anniversary date of appellant's lease was July 1, 1975. However appellant's rental check was received on July 24, 1975, in an envelope bearing a July 21, 1975, postmark, and thus was not filed until after 20 days beyond the due date. The check was cashed and the funds were placed in an unearned account pending a determination as to proper disposition. With his statement of reasons, appellant attached what appears to be a copy of his check, on which appears the following:

*BY ENDORSEMENT THIS  
CHECK WHEN PAID IS  
ACCEPTED IN FULL PAY-  
MENT OF THE FOLLOWING  
ACCOUNT*

Annual Rental on Gas & Oil Lease  
No. ES 11658

[1] Appellant's oil and gas lease terminated by operation of law and not by the act of any official when the annual rental payment was not received in the proper office by the close of business on July 1, the anniversary date of the lease. 30 U.S.C. § 188(b) (1970); 43 CFR 3108.2-1 (a). Although the decision of the Eastern States Office considered the merits of appellant's petition for reinstatement and reached the correct result,<sup>1</sup> the fact that no tender of payment was received until July 24 required outright rejection of appellant's petition. Pursuant to 30 U.S.C. § 188(c) (1970), the Board has consistently held that the Secretary has no authority to reinstate a terminated lease unless payment has been tendered within 20 days of the due date. *E.g., C. J. Iverson*, 21 IBLA 312, 82 I.D. 386 (1975). Under 43 CFR 3103.1-2(a), a rental is not paid or tendered when

<sup>1</sup> An oil and gas lease terminated by operation of law for failure to pay the advance rental on time may be reinstated only on a showing by the lessee that failure to pay on or before the anniversary date was either justified or not due to a lack of reasonable diligence. 30 U.S.C. § 188(c) (1970); 43 CFR 3108.2-1(c). Failure to mail the payment "sufficiently in advance of the anniversary date to account for normal delays in the collection, transmittal, and delivery of the payment" constitutes a lack of reasonable diligence. (Italics added.) 43 CFR 3108.2-1 (c) (2).

mailed but when paid or tendered at the proper office. *See Gordon R. Epperson*, 16 IBLA 60 (1974); 43 CFR 1821.2-2(f), 3108.2-1(c) (2).

[2] As to waiver, neither the Secretary nor any employee has authority to waive the requirements of section 188(c). *C. J. Iverson, supra* at 319. Despite the wording on appellant's check regarding acceptance in full payment, the cashing of the check and placing funds in an unearned account does not restate the lease by waiver. *See Henry Carter*, 24 IBLA 70, 71 (1976); cf. *United States v. Johnson*, 23 IBLA 349, 356 (1976).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

JOSEPH W. GOSS,  
*Administrative Judge.*

WE CONCUR:

DOUGLAS E. HENRIQUES,  
*Administrative Judge.*

ANNE POINDEXTER LEWIS,  
*Administrative Judge.*

**IN THE MATTER OF AFFINITY  
MINING COMPANY (PETITIONER)**

v.

**MINING ENFORCEMENT AND  
SAFETY ADMINISTRATION (RE-  
SPONDENT)**

AND

**UNITED MINE WORKERS OF  
AMERICA (RESPONDENT)**  
(On Reconsideration)

6 IBMA 100

Decided March 31, 1976

**Certified Interlocutory Ruling Docket  
No. M 75-98.**

**1. Federal Coal Mine Health and Safety  
Act of 1969: Mandatory Safety Stand-  
ards: Roof Control Plans**

The obligation to "carry out" the provisions of an adopted, approved, and effective roof control plan is a mandatory safety standard. The failure to "carry out" particular provisions of the plan is a violation of such standard. 30 U.S.C. §§ 802(1), 862(a) (1970).

**2. Federal Coal Mine Health and Safety  
Act of 1969: Modification of Applica-  
tion of Mandatory Safety Standards:  
Roof Control Plans**

The application of particular provisions of a roof control plan is subject to modification under sec. 301(c) of the Act. 30 U.S.C. § 861(c) (1970).

**APPEARANCES:** Thomas E. Boettger, Esq., and James R. Kyper, for petitioner Affinity Mining Company; Thomas A. Mascolino, Assistant Solicitor and Michael V. Durkin, Trial Attorney, for respondent Mining Enforcement and Safety Administration; Steven B. Jacobson, Esq., for respondent United Mine Workers of America; Timothy M. Biddle, Esq., for amicus curiae Itmann Coal Company; Guy Farmer, Esq., and William A. Gershuny, Esq., for amicus curiae Bituminous Coal Operators' Assn.; John T. Kilecullen, Esq., and Michael T. Heenan, Esq., for amicus curiae National Independent Coal Operators' Assn.

*OPINION BY CHIEF ADMIN-  
ISTRATIVE JUDGE DOANE*  
*INTERIOR BOARD OF MINE  
OPERATIONS APPEALS*

On Apr. 18, 1975, Chief Administrative Law Judge Luoma denied

March 31, 1976

a prehearing motion in the above-captioned docket by the Mining Enforcement and Safety Administration (MESA) to dismiss a petition by Affinity Mining Company (Affinity) to modify the application of its obligation under sec. 302(a) of the Federal Coal Mine Health and Safety Act of 1969 to carry out the provisions of the approved, effective roof control plan of its Keystone No. 5 Mine. 30 U.S.C. § 862(a). (1970), 30 CFR 75.200. This petition was filed under sec. 301(c) of the Act. 30 U.S.C. § 861(c) (1970). Rejecting MESA's argument that the obligation to carry out such plans is not a mandatory safety standard for the purposes of sec. 301(c), the Chief Administrative Law Judge ruled that the subject petition stated a valid claim upon which relief can be granted.

Pursuant to certification of that interlocutory ruling, 43 CFR 4.602, the Board reversed in a decision dated July 31, 1975, and the petition for modification was dismissed. 5 IBMA 36, 82 I.D. 363, 1975-1976 OSHD par. 19,880 (1975). This case is now before the Board for reconsideration pursuant to a petition therefor by Affinity which was granted on Sept. 10, 1975. 43 CFR 4.21(c).

The detailed procedural and factual background of this proceeding through July 31, 1975, is set forth in the Board's decision of that date and need not be repeated here. Subsequent to granting reconsideration,

we ordered a fresh round of briefing and held oral argument on Nov. 20, 1975. We note that on reconsideration we have also had the benefit of the views of three amici curiae—Itnann Coal Company, Bituminous Coal Operators' Assn., and National Independent Coal Operators' Assn.—as well as those of the three parties.

We turn now directly to the narrow issue raised by the ruling below which is whether the obligation to carry out a roof control plan is a mandatory safety standard, the application of which is subject to modification under sec. 301(c) of the Act, 30 U.S.C. § 861(c). (1970), upon a requisite evidentiary showing. Inasmuch as this case arises out of an interlocutory ruling denying a prehearing motion to dismiss, we assume *arguendo* that the allegations of fact in Affinity's petition for modification are true and that the subject petition states a legally sufficient claim if the obligation to carry out a roof control plan is a mandatory safety standard. 43 CFR 4.602(d).

Sec. 301(c) provides as follows:

Modification of standards; notice; investigations; hearings; findings; applicability of section 554 of Title 5

Upon petition by the operator or the representative of miners, the Secretary may modify the application of *any mandatory safety standard* to a mine if the Secretary determines that an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such

mine by such standard, or that the application of such standard to such mine will result in a diminution of safety to the miners in such mine. Upon receipt of such petition the Secretary shall publish notice thereof and give notice to the operator or the representative of miners in the affected mine, as appropriate, and shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing, at the request of such operator or representative or other interested party, to enable the operator and the representative of miners in such mine or other interested party to present information relating to the modification of such standard. The Secretary shall issue a decision incorporating his findings of fact therein, and send a copy thereof to the operator or the representative of the miners, as appropriate. Any such hearing shall be of record and shall be subject to section 554 of Title 5 of the United States Code. [Italics added.]

[1] MESA has argued throughout this proceeding that the obligation to carry out a roof control plan is *not* a "mandatory safety standard" within the meaning of the Act. It contends that such plans are "enforceable requirements" or sec. 301(d) rules, neither of which is subject to administrative adjudication under sec. 301(c). 30 U.S.C. § 861 (c), (d) (1970). The UMWA is in substantial agreement with MESA's views.

Having reconsidered the Board's initial ruling and re-examined the arguments of MESA and UMWA, we now conclude that the Chief Administrative Law Judge correctly held that Affinity stated a legally sufficient claim for relief under sec. 301(c). We have so concluded because the language and structure of

the Act, the legislative history, and the Congressional purposes, as we understand them, all point in that direction.

In construing the Act and the regulations promulgated pursuant thereto, we bear in mind our responsibility to construe the statutory language with reasonable generosity in instances of ambiguity so as to effectuate the remedial legislative purposes. However, we also remain cognizant of our concomitant obligation to stay within the boundaries set by the language. We have no authority to disembody the purpose from the language and proliferate it willfully in the guise of an interpretation.

The particular dispute here revolves around the appropriate interpretation of the term "mandatory safety standard" as used in sec. 301(c) of the Act. That term is defined by sec. 3(1), 30 U.S.C. § 802(1) (1970), as:

\*\*\* the interim mandatory \*\*\* safety standards *established* by title \*\*\* III of this Act and the standards promulgated pursuant to title I of this Act \*\*\*. [Italics added.]

Roof control plans are not "\*\*\* promulgated pursuant to title I \*\*\*," and thus, the issue in this case boils down to whether the obligation to comply with such plans is, in the words of sec. 3(1), "\*\*\* established by \*\*\*" title III of the Act.

The Federal Coal Mine Health and Safety Act of 1969 is of course an organic whole, and accordingly, statutory definitions within it ought

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not to be treated as axiomatic first premises in a syllogism. Such definitions do not stand by themselves and their meaning can be ascertained only if they are read in context. Applying this principle to the case at hand, we think that the meaning of the critical words "\*\*\* established by \* \* \*" in the legislative definition of mandatory safety standards in section 3(1) must be derived from an analysis of title III to which that definitional section refers.

Among other things, the provisions of title III set forth interim mandatory safety standards which are applicable "\*\*\* to *all* underground coal mines until *superseded* in whole or in part by improved mandatory safety standards promulgated by the Secretary under the provisions of sec. 101 of this Act. \* \* \*" (Italics added.) 30 U.S.C. § 861(a) (1970). The use of the word "*superseded*" and the reference to "*all* underground coal mines" in sec. 301(a), which contains a description of title III, make clear that the Congress contemplated that basic alteration of the interim safety standards would be subject to special statutory rulemaking procedures set forth in sec. 101 of the Act, procedures carefully designed for the exclusively legislative character of such policy determinations. 30 U.S.C. § 811 (1970).

Although most of the interim standards in title III are precise, there are instances where the Congress set forth a general standard,

leaving its content to be fleshed out later on.<sup>1</sup> In some of these instances the Congress elected to require the Secretary to "prescribe" the benchmark by which compliance with such standard would be measured, this to be done in accordance with general rulemaking procedures incorporated by reference in sec. 301(d) (1970). *See, e.g.*, 30 U.S.C. § 862(c) (1970). Moreover, in sec. 301(c) of the Act, the Congress conferred upon the Secretary discretionary authority to grant petitions by operators or representatives of miners for modification of the application of a "mandatory safety standard," provided that an appropriate evidentiary showing has been made in a formal adjudicative proceeding. *See, e.g., Can-nelton Industries, Inc.*, 4 IBMA 74, 82 I.D. 102, 1974-1975 OSHD par. 19,436 (1975). With respect to fleshing out a standard under sec. 301(d) or modifying an application under sec. 301(c), it is plain that the Secretary need not go through the special statutory rulemaking procedure set forth in sec. 101,<sup>2</sup> and

<sup>1</sup> We observe in passing that title III also contains express grants of authority to develop a wholly new standard, as distinguished from fleshing out the particulars of an existing standard. *Compare* 30 U.S.C. § 877(1) with 30 U.S.C. § 862(c) (1970).

<sup>2</sup> *See* House Comm. on Ed. and Labor, *Legislative History Federal Coal Mine Health and Safety Act* (hereinafter *Leg. Hist.*), Comm. Print, 91st Congress, 2d Sess., p. 1126. *See also United States v. Finley Coal Company*, 345 F. Supp. 62 (E.D. Ky. 1972), unpublished Supplemental Memorandum Opinion (denying motion to reconsider) at pp. 2-4 (E.D. Ky. September 12, 1972), *aff'd* 493 F. 2d 285 (6th Cir. 1974), *cert. denied*, 419 U.S. 1089 (1974).

further, that the products of such procedures are enforceable. In light of the foregoing, we conclude that when the Congress, in sec. 3(1), defined a *mandatory safety standard* in part as being standards "\*\*\* established by \* \* \*" title III, the legislators meant to encompass those standards to be filled in or generated pursuant to special procedures set forth in title III.<sup>3</sup>

Turning to the specifics of this case, we start with the observation that the safety standards dealing with roof control are set forth in sec. 302 of the Act, 30 U.S.C. § 862 (1970), a part of title III, and have not been "superseded" within the

meaning of sec. 301(a), 30 CFR 75.200, 75.201, 75.202, 75.203, 75.204, and 75.205.

Subsec. (a) of sec. 302, 30 U.S.C. § 862(a), 30 CFR 75.200, states that:

Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. \* \* \* [Italics added.]

This keynoting phrase makes clear than an operator is not only obliged to have a program to improve the roof control system, but it must also *implement* the components of such program.

Sec. 302 then goes on to establish in broad terms the basic components of a program to improve roof control systems which, as the above-quoted phrase indicates, an operator is obliged to carry out. The first of these components is a general obligation to support or otherwise control adequately the roof and ribs of all active underground roadways, travelways, and working places. The second of these components is the "adoption" of an approved roof control plan, a term which itself connotes acceptance of legally enforceable responsibilities. 30 CFR 75.200-1. See generally *Bishop Coal Company*, 5 IBMA 231, 82 I.D. 553, 1975-1976 OSHD par. 20,165 (1975), *appeal pending sub nom, Bennett v. Kleppe*, D.C. Cir. No. 75-2158.

Subsecs. (a), (c), (d), and (e) of sec. 302 contain references to subjects that the Congress contemplated would be covered by roof

<sup>3</sup> The argument that "mandatory safety standards" encompass only those requirements set forth in so many words in title III or promulgated under title I of the Act is urged upon us here by the UMWA, but it has also been advanced by operators from time to time. Recently, Zeigler Coal Company and the Bituminous Coal Operators' Assn. made this argument in the United States Court of Appeals for the District of Columbia Circuit in support of their claim that the Board had erred in sustaining a withdrawal order citing nonconformance with a ventilation plan. *Zeigler Coal Company*, 4 IBMA 30, 82 I.D. 36, 1974-1975 OSHD par. 19,237 (1975), *appeal pending*, D.C. Cir. No. 75-1139. The Board had concluded that Zeigler's claim was essentially frivolous.

If, however, this argument has greater persuasive force than we now believe, the it would necessarily follow that a modification of the application of a "mandatory safety standard" is not a standard itself, inasmuch as such modification was not promulgated under Title I or set forth in so many words in Title III. Furthermore, a corollary of this proposition would be that inasmuch as modifications of applications are not "mandatory safety standards" within the meaning of the Act, they would not be enforceable under section 104, which, in pertinent subsections, is limited to "mandatory safety standards." 30 U.S.C. § 814 (b), (c) (1970).

Each of these propositions is obviously absurd, but they are the logical derivatives of the argument based on sec. 3(1) urged on us here and in *Zeigler Coal Company*, *supra*.

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control plans. The language of these provisions leaves no doubt that compliance with the provisions of a roof control plan is not voluntary.

For example, subsec. (a) provides that:

\* \* \* No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not *required* under the approved roof control plan and the absence of such support will not pose a hazard to the miners. \* \* \* [Italics added.]

It would be absurd to talk in terms of what a roof control plan does or does not *require*, unless compliance with its provisions *is required*. See n. 3, *supra*.

In subsec. (d), 30 CFR 75.203, the Congress enacted the following: "When installation of roof bolts is permitted, such roof bolts shall be tested in accordance with the approved roof control plan." This provision assumes that, in mines where roof bolting is permissible, the testing of such bolts is a necessity and the standard of compliance with this testing requirement shall be set forth in the roof control plan. Here again, it is nonsense to speak of acting "\* \* \* in accordance with the approved roof control plan \* \* \*" unless conformance with it is mandatory.

Based on the foregoing analysis, we think that the obligation to carry out or implement a roof control plan fits into the definition of a mandatory safety standard stated in section 3(1) and quoted earlier.

It fits the pattern of the general standards the content of which is to be fleshed out under special statutory procedures set forth in title III. Compliance with the general standard, in this case conformance to one's roof control plan, is defined and measured in terms of such plan's provisions. We are of the opinion that nonconformance with any one of these provisions constitutes a violation of the general standard.

[2] Having concluded preliminarily that the obligation to carry out a roof control plan is a mandatory safety standard and that the violation of a part of the plan is a violation of the standard, it follows logically that the application of such standard is subject to modification under sec. 301(c). It so follows because that section states in so many words that upon petition "\* \* \* the Secretary may modify the application of *any* mandatory safety standard \* \* \*" provided an appropriate evidentiary showing is made.

As we noted at the outset, MESA and the UMWA have espoused the view that roof control plans are not "mandatory safety standards." They would have us hold that such plans are in a different category which they describe as "enforceable requirements." By making this artificial and confusing distinction between "mandatory safety standards" and "enforceable requirements," they seek to account for the

inclusion of such plans within the enforcement provisions of sec. 104 of the Act, 30 U.S.C. § 814 (1970), and their exclusion from the ambit of sec. 301(c), 30 U.S.C. § 861(c) (1970).

Their argument is, however, completely self-defeating. The principal parts of sec. 104 dealing with enforcement of mandatory standards are subsec. (b) and (c), 30 U.S.C. § 814 (b) and (c) (1970), which, by their terms, apply to "any mandatory \* \* \* safety standard," the very same words appearing in sec. 301(c). MESA and the UMWA would apparently have us read the words *and other enforceable requirements* into sec. 104 on the theory that where ambiguities arise in the Act, a liberal interpretation is dictated in order to effectuate the remedial legislative objective of regulating the underground coal mining industry so as to raise its standards of care and reduce the injury rate. However, if we were to interpret sec. 104 in this manner, then necessarily we would have to reach the same kind of result with respect to section 301(c). That section, *inter alia*, allows for modification of the application of a mandatory safety standard to a mine if either the operator or the representative of miners can show by a preponderance of the evidence "*\* \* \** that the application of such standard to such mine will result in a diminution of safety \* \* \*." The objective of this part of sec. 301(c) is plainly to avoid making mandatory standards, however derived, into an irrational straightjacket

which would subvert the very purposes of such requirements. Thus, for the very same reason given for expansively construing sec. 104, a similarly liberal interpretation would have to be given to sec. 301 (c) were we to accept the distinction urged on us.

MESA and the UMWA also contend that the action by the District Manager with respect to a proposed roof control plan is rulemaking under 5 U.S.C. § 553 (1970) and that the Board has no delegated authority to review the validity of regulations of the Secretary. Second, they insist that sec. 301(c) is a "review" proceeding. Based upon these premises, they would have us conclude that Affinity has not stated a claim upon which relief can be granted.

In our opinion, this argument must be rejected because the conclusion is based upon two erroneous premises.

With regard to the former, we are of the opinion that a policy decision by a District Manager to reject a proposed roof control plan, or more accurately in the context of this case, a refusal to make policy on the merits, is not rulemaking under 5 U.S.C. § 553 (1970).<sup>4</sup> We believe that the Congress provided for the procedural rights of both operators and the representatives of miners with respect to adoption and approval of roof control plans

<sup>4</sup> If one conceptualizes the submission of a proposed roof control plan as a petition to engage in rulemaking under 5 U.S.C. § 553(e) (1970), as does the UMWA, then the District Manager in this case refused to engage in such a proceeding.

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in sec. 302(a),<sup>5</sup> and protected the exclusivity of the procedure outlined therein, as well as other statutory procedures, by enacting a general exclusion of 5 U.S.C. § 553 (1970) in sec. 507 of the Act, 30 U.S.C. § 956 (1970). See *Bishop Coal Company, supra*.

And insofar as the secondary premise regarding the nature of sec. 301(c) is concerned, we hold that sec. 301(c) is not a review proceeding as such; it is an original de novo proceeding for a remedy in which the validity of the standard, the application of which is sought to be modified, is not an issue. Indeed it would be absurd to conclude otherwise because if it were true that sec. 301(c) provides for a review proceeding, then we have been finding interim or improved safety standards invalid as applied every time we have granted relief under this section in the past, a judgment we were plainly not making. See, e.g., *Cannelton Industries, Inc., supra*.<sup>6</sup>

<sup>5</sup> See *Leg. Hist., supra*, p. 1126 where it was said: " \* \* The plan and revisions must be made available to the miners, both before and after approval." The enactment of a special procedure in section 302(a) and the exclusion of 5 U.S.C. § 553 in sec. 507, when read together, reveal a legislative preference for an informal procedure involving technical people without the need for lawyers giving advice on the interpretation of a rulemaking statute.

Moreover the requirement to provide the plan to the miners with the implied right to comment, which appears in sec. 302(a), would be duplicative if rulemaking applied to a decision by a District Manager to approve or disapprove a proposed roof control plan.

<sup>6</sup> We note in passing that sec. 301(d), 30 U.S.C. § 861(d) (1970), provides limited authority to grant so-called administrative "exceptions" to mandatory safety standards

Apart from the arguments just discussed and rejected, neither MESA nor the UMWA advances a serious policy reason to account for the result they urge upon us. Perhaps the most striking aspect of their briefs and oral arguments is the lack of any genuine rationale to square the reasoning they employ with the overall Congressional procedural and substantive policies that sec. 301(c) was designed to serve. Indeed at the oral argument, one of the attorneys for MESA candidly acknowledged that if we were to hold for Affinity, MESA would suffer no grave impact and we would not be opening the floodgates to a torrent of litigation.<sup>7</sup>

But if there are no sound reasons supportive of a narrow construction of sec. 301(c), we discern some which persuade us that the Congress intended the broad construction of that section which we are making today.

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provided the Secretary acts in accordance with 5 U.S.C. § 553 (1970). The Conference Report on the Act contains the following comment with respect to this grant of authority: " \* \* \* If the miners believe that the exception will diminish safety, their recourse is to utilize the provisions of sec. 301(c)." *Leg. Hist., supra*, p. 1126. That comment effectively belies the theory that we have no subject matter jurisdiction under sec. 301(c) over the products of administrative actions performed under the rulemaking procedures incorporated by reference into sec. 301(d). This portion of the legislative history also undercuts the theory that the phrase "any mandatory safety standard" in sec. 301(c) refers only to generally applicable quasi-legislative regulatory policies, a theory which formerly commanded a majority of the Board and which neither MESA nor the UMWA has argued.

<sup>7</sup> Most modification cases are settled before litigation, and it is comparatively rare for a genuine contest to develop.

We think the Congress contemplated that there would be instances where claims would arise for relief from an existing safety standard in the form of a request to substitute an alternative standard, claims that are meritorious and should be granted. In enacting sec. 301(c), the legislators set forth the criteria and procedures for ultimately determining whether a given claim is meritorious with respect to "any mandatory safety standard," a phrase indicative of wide-ranging applicability and admitting of no exceptions.

In addition, we believe that sec. 301(c) is a unique legislative creation which was a product of Congressional recognition of certain limitations in the "APA" rulemaking and judicial review procedures, a perception which probably accounts in large measure for the circumscribed role assigned such procedures under the Act. Compare 30 U.S.C. § 956 with 30 U.S.C. §§ 861(d) and 957 (1970).<sup>8</sup> In the

<sup>8</sup> Sec. 508 of the Act, 30 U.S.C. § 957 (1970), grants the Secretary residual rulemaking power. It does not contain specific procedures for the exercise of such power, leaving the implication that 5 U.S.C. § 553 applies. It is likely that true interpretative rulemaking and matters of administrative housekeeping and procedural detail fall within this residual grant. See *United States v. Finley Coal Company*, *supra*, unpub. memo. at p. 4, and *United Mine Workers of America v. Inland Steel Co.*, 6 IBMA 71, 83 I.D. 87, 1975-1976 OSHD par. 20,529 (1976).

Otherwise 5 U.S.C. § 553 (1970) seems to apply only insofar as expressly provided in sec. 301(d), 30 U.S.C. § 861(d) (1970), a provision which should not be expansively construed in light of the general exclusion in sec. 507 with respect to "APA" review procedures. *Id.* at p. 3.

The UMWA has contended that Affinity's claim could be adjudicated on the merits under 5 U.S.C. §§ 701-706, but in light of sec. 507 we think that such contention is erroneous.

first place, although there is a right *to petition* for particular as well as general policymaking under 5 U.S.C. § 553(e) (1970), an administrative agency cannot be forced into discretionary rulemaking; that is to say, there is generally no private right to compel an agency to institute a rulemaking proceeding or to make policy in a discretionary matter. See n. 4, *supra* and *Rhode Island Television Corp. v. F.C.C.*, 320 F. 2d 762, 766 (D.C. Cir. 1963). Sec. 301(c) was evidently designed so that an operator *or* the representative of miners would have the *right* to a policy determination in modification cases, as well as the *right* to petition for such a determination. Then too, particular policymaking under 5 U.S.C. § 553 (1970) does not comprehend a private right to a trial-type hearing. Modification cases commonly and primarily involve technical and factual questions, and sec. 301(c) manifests a legislative determination that in this class of contested cases involving individual mines, a primarily adjudicative process is a superior method for *finally* settling the substantive, administrative policy. Furthermore, it appears to us that the Congress recognized that the applicable standard of "APA" judicial review under 5 U.S.C. §§ 701-706 (1970), namely, rationality, was unsuitably narrow because it did not assure a sufficient degree of "tailor-made equity" where questions arise regarding the Secretary's response to the unique complexities of a particular situation. See *Gulf Oil Corp.*

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v. *Hickel*, 435 F. 2d 440, 447 (D.C. Cir. 1970).<sup>9</sup>

Lastly, sec. 301(c) vests primary adjudicative jurisdiction in the Secretary over particular policymaking with respect to individual mines. This is just one more illustration of a uniform legislative policy to provide a full set of administrative remedies honed to the peculiar needs of the Act and to bring informed agency expertise to bear in a way that will make judicial review meaningful. See *Rhode Island Television Corp. v. F.C.C.*, *supra*; *Sink v. Morton*, 529 F. 2d 601 (4th Cir. 1975), 1975-1976 OSHD par. 20,043; and *Eastern Associated Coal Corp.*, 5 IBMA 74, 82 I.D. 392, 1975-1976 OSHD par. 19,921 (1975). See also *Leg. Hist.*, *supra*, p. 1034. Neither MESA nor the UMWA has offered a justification for breaching the uniformity of that policy.

<sup>9</sup> In sec. 301(c), the Secretary was given discretion to grant relief from a mandatory safety standard in cases where it is proved that " \* \* \* an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard \* \* \*." One of the evident purposes of this provision is avoidance of situations where an operator is forced to absorb costs unrelated to safety which will ultimately be passed on to the public. If there were neither a sec. 301(c), nor an exclusion of "APA" judicial review in sec. 507, then the refusal to take account of such costs would not entitle the operator to relief in a review proceeding in a district court because such refusal would be deemed arbitrary and capricious only if there were proof of "extreme hardship." See *Gulf Oil Corp. v. Hickel*, *supra*, at 447-8. And we doubt that members of the public would be in any better position to seek redress.

For the foregoing reasons, we are affirming the Chief Administrative Law Judge's ruling and holding that the application of an operator's obligation to conform to its roof control plan is a mandatory safety standard subject to modification under sec. 301(c).

### ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that, upon reconsideration, the Board's decision of July 31, 1975, 5 IBMA 36, 82 I.D. 392, 1975-1976 OSHD par. 19,880 (1975), IS SET ASIDE, and the order of dismissal based thereon IS VACATED.

IT IS FURTHER ORDERED that, upon reconsideration, the interlocutory ruling certified to the Board IS AFFIRMED.

DAVID DOANE,

*Chief Administrative Judge.*

I CONCUR:

JAMES R. RICHARDS,  
*Director.*

OFFICE OF HEARINGS AND APPEALS  
*Ex-Officio Member of the Board.*

SEPARATE VIEWS OF ADMINISTRATIVE JUDGE  
SCHELLENBERG:

I would affirm the Board's decision of July 31, 1975. On reconsideration I am not persuaded that

the Secretary has delegated to this Board either his statutory authority to approve a roof control plan or authority to review actions of his delegates taken pursuant to that statutory authority in sec. 302(a) of the Act. The provisions of 30 CFR 75.200-4 and 75.200-6 appear to me to particularly disavow any Secretarial intention to delegate roof control plan approval to this Board.

Furthermore, it is my opinion that the statutory purpose of sec. 301(c) makes it an inappropriate vehicle for review even if roof control plan approval was specifically delegated to the Board.

HOWARD J. SCHELLENBERG, JR.,  
*Administrative Judge.*

#### APPEAL OF S. A. HEALY COMPANY

IBCA-944-12-71

Decided *March 31, 1976*

Contract No. 14-06-D-7058, Specifications No. DC 6855, Bonneville Unit, Central Utah Project, Bureau of Reclamation.

Denied.

1. Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: Conflicting Clauses—Contracts: Performance or Default: Suspension of Work

Appellant's claim for an equitable adjustment under the changes clause for costs alleged to have been incurred when funds available for earnings became exhausted and work on the contract was suspended

for 160 days is denied where construction was suspended more than 3 months ahead of the date on which appellant's earnings were scheduled to reach the amount of the fund reservation and where subsequent fund reservations kept the total amount of funds reserved for earnings above the scheduled earnings shown in appellant's own construction program which the Government had approved.

**APPEARANCES:** Mr. A. Barlow Ferguson, Attorney at Law, Thelin Marrin Johnson & Bridges, San Francisco, California, for the appellant; Mr. John R. Little, Jr., Department Counsel, Denver, Colorado, for the Government.

#### OPINION BY ADMINISTRATIVE JUDGE PACKWOOD INTERIOR BOARD OF CONTRACT APPEALS

This is an appeal from a decision of the contracting officer denying an equitable adjustment under the changes clause for the increased time and expense of contract performance which occurred after the construction was shut down due to exhaustion of funds. Appellant attributed the lack of funds to the Government's failure to reserve or request sufficient funds for the project. The contracting officer took the position that the Government's actions with respect to funding were proper under the Funds Available for Earnings clause and constituted neither a constructive change nor a constructive suspension of work.

Contract No. 14-06-D-7058 was awarded to the S. A. Healy Company (referred to herein as Healy or

appellant) on Nov. 18, 1970, in the estimated amount of \$10,971,025 for the construction of the Current and Layout Tunnels, together with certain diversions and appurtenant structures, for the Strawberry Aqueduct, Central Utah Project. The work was divided into two parts. Part one consisted of diversion works and was required to be finished by Nov. 1, 1971. Part two consisted of the two tunnels, a concrete siphon and other outside work and was required to be finished 1400 days after notice to proceed. Healy received the notice to proceed on Nov. 19, 1970, which set the completion date for part two on Sept. 19, 1974.<sup>1</sup>

On Dec. 3, 1970, the authorized representative of the contracting officer (referred to hereafter as COAR) advised Healy by letter that the sum of \$500,000 had been reserved for earnings under the contract and cautioned that, in accordance with the terms of the contract, prosecution of the work at a rate that would exhaust the funds reserved before the end of the fiscal year would be at Healy's own risk.<sup>2</sup>

Pursuant to Paragraph 15 of the contract,<sup>3</sup> Healy submitted a construction program for approval on

Dec. 22, 1970. The scheduled earnings set forth in the construction program were \$116,000 in fiscal year 1971, \$4,887,000 in fiscal year 1972, \$4,714,000 in fiscal year 1973 and \$1,254,000 in fiscal year 1974. Completion of the construction was scheduled in December 1973, some 9 months before the completion date required by the terms of the contract. Healy's construction program was approved by the COAR in a letter dated Feb. 22, 1971. The letter of approval contained no comment on and no objection to the early completion date set forth in the schedule.<sup>4</sup>

Healy's approved program showed construction beginning in May 1971, with earnings reaching \$99,000 at the end of May. In June, Healy's program called for earnings of \$17,000 to bring the total to \$116,000 for fiscal year 1971. Healy actually began construction in Apr. and earned \$128,000 in the first month. Accumulated earnings rose to \$142,000 at the end of May and to \$345,000 at the end of June, which was also the end of the fiscal year.<sup>5</sup> The earnings were well below the fund reservation of \$500,000 for fiscal year 1971 and no funding problem was apparent to Healy at that time.

At the beginning of fiscal year 1972, the COAR advised Healy that the budget request submitted to Congress included only \$1,800,000 for earnings under the contract for fiscal year 1972 and that amount

<sup>1</sup> Appeal File, Exhibit No. 1. The contract deleted the standard clauses and added the changes and suspension of work clauses, No. 3 and No. 5, which are set forth in full in Appendix A, p. 127.

<sup>2</sup> Exhibit No. 2. Numbered exhibits referred to herein are those in the Appeal File. Government and appellant's exhibits are so designated.

<sup>3</sup> Paragraph 15 of the contract is entitled "Construction Program" and is set forth in full in Appendix A at p. 129.

<sup>4</sup> Exhibit No. 3.

<sup>5</sup> Exhibit No. 3; Government Exhibit No. 26.

had been made available under a Joint Resolution of Congress prior to passage of the Appropriation Act. The amount made available under the joint resolution was reserved for earnings, bringing the total fund reservation to \$2,300,000. The COAR disclaimed any responsibility on the part of the Government to provide funds in addition to those reserved in writing and cautioned Healy that prosecution of the work at a rate in excess of the rate provided for in the budget request would be at Healy's own risk.<sup>6</sup>

Although Healy immediately protested that the amount included in the budget request was totally inadequate and asserted that an additional \$4,000,000 would be necessary to enable it to proceed efficiently and economically,<sup>7</sup> it took no action to scale down its operations to the amount of the budget request or even to scale down the construction to the pace set forth in its own schedule.

In July 1971, Healy's approved construction program called for earnings of \$197,000. The actual earnings were \$613,000. In August, Healy's program called for earnings of \$318,000 and the actual earnings were \$708,000.<sup>8</sup>

On Sept. 1, 1971, Healy wrote to the COAR to advise that the existing fund reservation would be exhausted in the next 30 days and to give formal notice under Subparagraph 11e of the need for additional

funds to continue the work.<sup>9</sup> This letter was followed by a letter of Sept. 9, 1971,<sup>10</sup> in which Healy asserted that it had proceeded to man, equip and plan its operations and undertook the performance contemplated by and in conformity with the approved construction program. Healy further asserted that the exculpatory provisions of Paragraph 11, "Funds Available for Earnings," were not brought into play since there was no failure on the part of Congress to appropriate the amount in the budget request. Healy requested a written change order or orders taking into consideration the adverse effects on its methods and manner of performance of the work caused by the funding situation.

In the meantime, despite its assertion that it was proceeding in accordance with its approved construction program, Healy continued construction at an even greater rate of acceleration beyond that program. On Sept. 22, 1971, when the approved construction program showed slightly more than \$1,000,000 in accumulated earnings, Healy's actual earnings reached the amount of funds then reserved, \$2,300,000 and tunneling operations were shut down. The fund reservation at that time was sufficient to sustain construction in accordance with Healy's approved program until the fourth week in Dec. 1971.<sup>11</sup>

On Sept. 24, 1971,<sup>12</sup> the COAR responded to Healy's letter of

<sup>9</sup> Paragraph 11 is entitled "Funds Available for Earnings" and is set forth in full in Appendix A.

<sup>10</sup> Exhibit No. 10.

<sup>11</sup> Government Exhibits No. 26 and No. 27.

<sup>12</sup> Exhibit No. 11.

<sup>6</sup> Exhibit No. 4.

<sup>7</sup> Exhibit No. 7.

<sup>8</sup> Government Exhibit No. 26.

Sept. 9 and stated his belief that the handling of funds was proper in accordance with Paragraphs 11 and 15 of the contract.<sup>13</sup> The COAR took the view that the obligation of the Government was made expressly contingent upon the availability of funds and that the Government was not liable for damages on account of delays in payments due to lack of funds. The COAR declined to issue a change order under Clause 3 or instructions under Clause 4A, Suspension of Work, but advised that, as provided in Paragraph 11, Healy could suspend work or, at its option, continue with the understanding that no further payment would be made unless and until Congress provided additional funds.

The letter of Sept. 24 also made an additional fund reservation of \$350,000, bringing the total reservation to \$2,650,000. The additional funds were deemed insufficient to allow resumption of tunneling and by agreement of the parties were utilized for completion of the outside diversion work under part one of the contract.

The continued acceleration beyond the approved construction program is shown by the fact that Healy's earnings in Sept., even with the shutdown of tunneling on Sept. 22, amounted to \$796,000, while the approved program had scheduled only \$611,000 for the month. The total fund reservation of \$2,650,000 as of Sept. 24, 1971,

was sufficient to permit construction in accordance with Healy's approved program until the third week in Jan. 1972.<sup>14</sup>

Pursuant to a supplemental appropriation, the COAR made an additional reservation of funds in the amount of \$3,650,000 by letter of Jan. 6, 1972,<sup>15</sup> which was received by Healy on Jan. 10, 1972.<sup>16</sup> This additional reservation raised the total of funds reserved for earnings in fiscal year 1972 to \$6,300,000, an amount considerably in excess of the accumulated earnings of \$5,003,000 scheduled at the end of the fiscal year in Healy's approved construction program.<sup>17</sup>

After a short delay required to reassemble its work force and approximately 6 weeks spent on modification and renovation of the tunneling machine, Healy resumed tunneling on or about Mar. 1, 1972, after a 160-day shutdown of the tunneling operation. At the end of Apr., Healy's accumulated earnings reached \$4,100,000, slightly above the scheduled amount in its approved program, which was \$4,032,000.<sup>18</sup>

Healy claimed entitlement to an equitable adjustment under the changes clause for the costs incurred during the 160-day shutdown and for subsequent increases in labor, material and other costs flowing

<sup>14</sup> Government Exhibits No. 26 and No. 27.

<sup>15</sup> Exhibit No. 19.

<sup>16</sup> Transcript of Hearing, first day, p. 6. References to the transcript hereafter will be designated Tr. 1 and Tr. 2, followed by the page number or numbers.

<sup>17</sup> Government Exhibit No. 26.

<sup>18</sup> Tr. 1, p. 141; Government Exhibit No. 26.

<sup>13</sup> Paragraphs 11 and 15, see Appendix A at pp. 128 and 129.

from the fact that all construction events following the shutdown occurred 160 days later and at higher prices than would have occurred but for the shutdown. The amount claimed in Healy's complaint of Apr. 12, 1973, was \$384,945. By letter of August 2, 1973, the amount claimed was increased to \$574,694. At the hearing, Healy presented evidence on claim items totalling \$898,394.<sup>19</sup> In its post-hearing brief, this amount was reduced to \$886,374.

During the pleading stage of the claim, the Government moved the Board to dismiss Healy's complaint, asserting that Healy's remedy, if any, was for breach of contract. The Board denied the Government's motion (*S.A. Healy Company*, IBCA-944-12-71 81 I.D. 354 (1974) 74-2 BCA par. 10,708, pointing out that it is the nature of the claim under the changes clause and not the character of the Government's defense that determines the Board's jurisdiction. On the incomplete record then before the Board, it could not be determined whether a change had resulted from the Government's actions or whether Healy's costs were increased. The Board ordered a hearing to develop the record more fully.

The Government, in its post-hearing brief, renewed its motion to dismiss the complaint without advancing any new arguments. The Board again denies the motion and will consider the claim on its merits.

Healy's theory of entitlement to an equitable adjustment under the changes clause is set forth on p. 15 of its post-hearing brief:

The basis of appellant's claim for a change order adjusting the compensation due Healy under the contract is the well-established principle that Government action disrupting agreed-on work schedules and planned sequences of operations constitutes a constructive change order calling for an equitable adjustment under the changes clause. E.g., *Thomas O. Connor & Co.*, ASBCA-15123, 71-2 BCA ¶ 8926 (1971); *I. K. Const. Enterprises, Inc.*, ASBCA-10987, 67-1 BCA ¶ 6271 (1967); *Paul J. Vagnoni*, ASBCA-11329, 67-1 ¶ 6349 (1967). Here, the contractually required Construction Program approved by the Government constitutes an agreed on method of contract performance, at least with respect to the *scale* of appellant's operations, and the Government's failure to reserve or request funds sufficient to enable appellant to perform at the agreed-on scale necessarily constitutes a change in the contract within the principles established by the foregoing cases. [*Italics in original.*]

[1] The doctrine of constructive change based on Government action disrupting agreed-on work schedules is indeed well established, as appellant asserts. The application of such doctrine to the facts in this case, however, is not readily apparent. The first part of Healy's allegation, that the Government failed to reserve funds sufficient to enable Healy to perform at the agreed-on scale, finds no support in the record. To the contrary, as indicated above, the record shows that the reservation of funds was, at all times prior to and during the shutdown, in excess of the scheduled earnings in

<sup>19</sup> Appellant's Exhibit A.

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Healy's approved construction program.<sup>20</sup>

On the record, the Board is compelled to find that there was no failure on the part of the Government to provide funds sufficient to permit Healy to perform in accordance with its approved construction program.

Although the eventual fund reservation for fiscal year 1972 amounted to \$5,800,000 and was substantially greater than the \$4,887,000 of earnings called for in Healy's approved construction program, the information furnished to Healy at the beginning of the fiscal year did not provide Healy with any basis for expecting that its scheduled construction would be adequately funded. Since the second part of Healy's allegation is that the Government's failure to request sufficient funds disrupted the agreed-on schedule and constituted a constructive change, the events which took place will be examined in the light of the information available to Healy at the time, in order to determine whether such change actually occurred.

Healy's first knowledge of a problem with funding came in the fund reservation letter of July 9, 1971, which stated that only \$1,800,000 had been included in the budget request for fiscal year 1972. In addition to protesting to the COAR that additional funds would be needed, Healy held a conference and exchanged correspondence with the

Commissioner of Reclamation regarding the possibility of obtaining additional funds for the contract. The Commissioner expressed the view that prospects for additional funds from a supplemental appropriation were very slight and predicted (erroneously, as it turned out) that even if a supplemental appropriation were passed, funds from it would not become available until late in the spring of 1972, which would be of little benefit in avoiding a shutdown.<sup>21</sup>

Upon learning of the funding problem, a management team of the Healy company, consisting of the president, two vice presidents and a third vice president who was also the chief engineer, considered the possible courses of action available to the company (Tr. 1, 130-140). Healy's then president, now chairman of the board of directors, testified that the first course of action considered was for Healy to finance the job itself and go forward with the construction. This course of action involved so much money that Healy was not able to assume the financial burden and this possibility was rejected.

The second course of action considered was to slow down the tunneling machine from the 24-hour-per-day, three-shift operation which Healy had undertaken to one or two shifts per day and take the reservation of \$1,800,000 over 12 months with an income of \$150,000 per month. The management team

<sup>20</sup> Government's Exhibits No. 26 and No. 27.

<sup>21</sup> Exhibit No. 8.

decided that such a low monthly income would result in a loss and it rejected this second possibility.<sup>22</sup>

The third possibility, the one chosen, was to proceed as far as possible and then stop when the funds were exhausted. No other course of action was considered reasonable by the management (Tr. 1, 137).

The decision to go as far as possible and then stop was not a decision on the part of Healy to do anything different. Since Healy decided not to reduce its around-the-clock operation of three shifts per day to one or two shifts per day, the

manner in which Healy proceeded after learning of the funding situation was exactly the same as it was before.

The pace of construction followed by Healy in the months prior to the shutdown of the tunneling operation on Sept. 22, 1971, is shown by the following chart derived from Healy's approved construction program (Appeal File Exhibit No. 3) and from Government Exhibit No. 26. The funds available and the scheduled and actual earnings are shown in thousands of dollars and are end of month figures:

	1971			Fiscal year 1972		
	Apr.	May	June	July	Aug.	Sept.
Funds available.....	\$500	\$500	\$500	\$2,300	\$2,300	\$2,650
Monthly earnings:						
Scheduled.....	0	99	17	197	318	611
Actual.....	128	14	203	613	708	796
Accumulated earnings:						
Scheduled.....	0	99	116	313	631	1,242
Actual.....	128	142	345	958	1,633	2,362

The chart of Healy's progress shows a continuing acceleration of the pace of construction after Healy learned that the initial budget request was inadequate to fund the approved construction program. Given the knowledge available to Healy at the beginning of the fiscal year, that the initial budget request was inadequate and that a supplemental appropriation was unlikely, Healy's continuing acceleration could only be calculated to advance the date of the predictable exhaustion of funds and to lengthen the

resulting shutdown. It is for the costs of the shutdown beginning on Sept. 22, 1971, that Healy now seeks an equitable adjustment, despite the fact that the total fund reservation of \$2,300,000 available on that date was sufficient to pay for the scheduled earnings in Healy's approved construction program until the fourth week in Dec. 1971.<sup>23</sup>

Healy's theory of entitlement to an equitable adjustment for a Government-caused change places it in

<sup>23</sup> Government Exhibits No. 26 and No. 27. The total reservation of funds was increased from \$2,300,000 to \$2,650,000 on Sept. 24, 1971.

<sup>22</sup> Tr. 1, 137-138.

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the anomalous position of insisting that the Government should be bound by the approved construction program in all aspects of fund reservations and requests although Healy did not follow its own approved program at any time prior to the shutdown.

Accordingly, the Board finds that the cause of the exhaustion of funds on Sept. 22, 1971, was Healy's decision to begin construction a month earlier than the date it proposed in its construction program and to pursue a program of continuing acceleration in the face of knowledge that the initial budget request was inadequate. Under Healy's theory that the approved construction program was controlling, its entitlement to an equitable adjustment under the changes clause could begin only when the Government action caused a change in the approved construction program or when the funds actually reserved proved to be inadequate to pay for the scheduled earnings. The Board further finds that neither of these events occurred.

We do not construe the Government's approval of the 9 months' acceleration of the completion date in Healy's construction program as giving Healy the right to accelerate even further with the expectation that the Government must provide funds for the additional acceleration or suffer the consequences. Healy cites no authority for its assumed right to proceed ahead of schedule and to require the Government to assist in such action. A case involving a construction contrac-

tor's claim that the Government was required to assist it in early completion was decided by the Supreme Court more than 30 years ago. In *United States v. Blair, et al.*, 321 U.S. 730 (1944), the construction contractor, Blair, notified the Government that it planned to complete construction in 314 days rather than the 420 days required by the contract. The Government did not require accelerated performance from another contractor on the project and Blair was unable to finish early as planned, but did finish within the time required. The Court of Claims found that Blair was unreasonably delayed for 3½ months and allowed damages for the costs of the delay. On certiorari, the Supreme Court stated on page 733:

We are of the opinion, however, that nothing in the Government construction contract used in this case imposed an obligation or duty on the Government to aid respondent in completing his contract prior to the stipulated completion date and that it was error for the Court of Claims to award damages to respondent based upon a breach of this non-existent obligation.

At page 734, the court held:

Respondent had the undoubted right to finish his construction work in less time than the stipulated 420 days, but he could not be forced to do so under the terms of the contract. To hold that he can exact damages from the Government for failing to cooperate fully in changing the contract by shortening the time provisions would be to imply a grossly unequal obligation. We cannot sanction such liability without more explicit language in the contract. (Citations omitted.)

The form of the Government construction contract has changed in

the intervening years since *Blair*, but the principle remains the same. The present contract contains no language, explicit or otherwise, which binds the Government to reserve or request funds for an acceleration beyond the approved construction program. In fact, even with respect to the contractor's approved construction program, Paragraph 15, Construction Program, provides that the contractor's estimate of earnings by months shall not obligate the Government to provide funds in any manner other than as provided in the paragraph entitled "Funds Available for Earnings." Paragraph 11, the funds available paragraph, in turn, states that the Government has no obligation to provide funds in addition to those reserved in writing<sup>24</sup> and further cautions the contractor that prosecution of the work at a rate that will exhaust the funds reserved before the end of the fiscal year will be at his own risk.

In a recently decided case, *C. H. Leavell and Company v. United States*, Ct. Cl. No. 91-74, decided Jan. 28, 1976, the Court of Claims explored the relationship between the funds available clause and the suspension of work clause in a Corps of Engineers contract. The Court allowed an equitable adjust-

ment for a suspension of work which resulted from an exhaustion of funds that occurred while Leavell was proceeding in accordance with a Government-approved construction program. The basis for the decision was the failure of the contract to allocate all risk of a funding shortage to the contractor. In so holding, however, the Court pointed out that the funds available clause used by the Bureau of Reclamation in the present case constituted such an allocation of risk to the contractor and raised a "red flag" to every prospective bidder. The Court further stated that the suspension of work clause used by the Bureau of Reclamation specifically excluded from its reach any equitable adjustment excluded under any other provision of the contract.<sup>25</sup>

### Conclusion

In accordance with the rationale of the *Leavell* decision, therefore, the Board finds that Healy is not entitled to an equitable adjustment under the suspension of work clause. The Board further finds, pursuant to the *Blair* case, *supra*, that Healy had no right under the contract to require the Government to furnish additional funds to sustain an acceleration beyond the approved acceleration of 9 months in

<sup>24</sup> *Winston Bros. Co. v. United States*, 131 Ct. Cl. 245 (1955) holds that allocation of appropriated funds to a particular contract must be on a rational and nondiscriminatory basis. There is no allegation in the present case that reservation of the appropriated funds was in any way improper. Healy's complaint is merely that the funds requested of Congress were inadequate to sustain its approved construction program.

<sup>25</sup> The Court of Claims noted in its discussion that the interaction between funds available and suspension of work clauses other than in the *Leavell* case seems to have arisen only before this Board in *Granite Construction Co.*, IBCA-947-1-72 (Nov. 13, 1972), 72-2 BCA par. 9,762, 79 I.D. 644, and in the present Healy case. The clauses herein are set forth in Appendix A.

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Healy's construction program. Since the funds reserved for earnings were, at all times during the period in question, in excess of the accumulated earnings scheduled in Healy's approved program, we are not called upon to decide whether the Government action with respect to funding would have constituted a change if an exhaustion of funds had occurred while Healy was proceeding in accordance with the approved construction program.

Healy's claim for an equitable adjustment under the changes clause is denied.

G. HERBERT PACKWOOD,  
*Administrative Judge.*

WE CONCUR:

SPENCER T. NISSEN,  
*Administrative Judge.*

WILLIAM F. MCGRAW,  
*Chief Administrative Judge.*

#### APPENDIX A

GENERAL PROVISIONS (Standard Form 23-A, June 1964 Edition):

a. *Clause No. 3.*—Clause No. 3, entitled "Changes," is deleted from Standard Form 23-A and the following clause is substituted therefor:

##### 3. CHANGES

(a) The Contracting Officer may, at any time, without notice to the sureties, by written order designated or indicated to be a change order, make any change in the work within the general scope of the contract, including but not limited to changes:

(i) in the specifications (including drawings and designs);

(ii) in the method or manner of performance of the work;

(iii) in the Government-furnished facilities, equipment, materials, services, or site; or

(iv) directing acceleration in the performance of the work.

(b) Any other written order or an oral order (which terms as used in this paragraph (b) shall include direction, instruction, interpretation, or determination) from the Contracting Officer, which causes any such change, shall be treated as a change order under this clause, provided that the Contractor gives the Contracting Officer written notice stating the date, circumstances, and source of the order and that the Contractor regards the order as a change order.

(c) Except as herein provided, no order, statement, or conduct of the Contracting Officer shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment hereunder.

(d) If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any order, an equitable adjustment shall be made and the contract modified in writing accordingly: Provided, however, That except for claims based on defective specifications, no claim for any change under (b) above shall be allowed for any costs incurred more than 20 days before the Contractor gives written notice as therein required: And provided further, That in the case of defective specifications for which the government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with such defective specifications.

(e) If the Contractor intends to assert a claim for an equitable adjustment under this clause, he must, within 30 days after receipt of a written change order under (a) above or the furnishing of a written notice under (b) above, submit to the Contracting Officer a written state-

ment setting forth the general nature and monetary extent of such claim, unless this period is extended by the Government. The statement of claim hereunder may be included in the notice under (b) above.

(f) No claim by the Contractor for an equitable adjustment hereunder shall be allowed if asserted after final payment under this contract.

\* \* \* \* \*

*Clause No. 4A.*—The following Clause 4A, entitled "Suspension of Work" is hereby added to Standard Form 23-A:

#### 4A. SUSPENSION OF WORK

(a) The Contracting Officer may order the Contractor in writing to suspend, delay, or interrupt all or any part of the work for such period of time as he may determine to be appropriate for the convenience of the Government.

(b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted by an act of the Contracting Officer in the administration of this contract, or by his failure to act within the time specified in this contract (or if no time is specified, within a reasonable time), an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by such unreasonable suspension, delay, or interruption and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent (1) that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor or (2) for which an equitable adjustment is provided for or excluded under any other provision of this contract.

(c) No claim under this clause shall be allowed (1) for any costs incurred more than 20 days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved (but this requirement shall not apply as to a claim resulting from a suspension order), and (2) unless the claim,

in an amount stated, is asserted in writing as soon as practicable after the termination of such suspension, delay, or interruption, but not later than the date of final payment under the contract.

#### Par. 11

#### 11. FUNDS AVAILABLE FOR EARNINGS

Pursuant to Section 12 of the Reclamation Project Act of 1939 (43 U.S.C., Sec. 388), funds for earnings under this contract will be made available as provided in this paragraph.

a. Under the contract to be entered into under these specifications, the liability of the United States is contingent on the necessary appropriations being made therefor by the Congress and an appropriate reservation of funds thereunder. Further, the Government shall not be liable for damages under this contract on account of delays in payments due to lack of funds.

b. Funds for payment of earnings under this contract are included in the budget for fiscal year 1971 which is now before the Congress and it is anticipated that they will be included in the Appropriation Act of fiscal year 1971. Prior to the effective date of the Appropriation Act, payment for earnings may be made from such funds as may be available by appropriations for interim periods by Congress within such limitations as may be imposed by Congress. The contractor will be advised of funds which are thus available. After the Appropriation Act is effective, the contractor will be notified of the sums, if any, reserved and available for payments under this contract for the fiscal year 1971. During this period between the end of fiscal year 1970 and the effective date of the Appropriation Act for fiscal year 1971, the provisions of Subparagraph e. regarding the giving of notices by the contractor and the Government as to exhaustion of funds shall not apply.

c. If at any time the contracting officer finds that the balance of reserved funds is in excess of the estimated amount re-

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quired to meet all payments due and to become due the contractor because of work performed or to be performed prior to July 1, 1971, the right is reserved to reduce said reservation by the amount of such excess. The contractor will be notified in writing of any such reduction.

d. If the rate of progress of the work is such that the contracting officer finds that the balance of reserved funds is less than the estimated amount required to meet all payments due and to become due because of work performed prior to July 1, 1971, the Government may reserve additional funds for payments under this contract if there are funds available for such purpose. The contractor will be notified in writing of such additional reservation.

e. Should it become apparent to the contractor that existing fund reservations will be exhausted within the next 30 days, the contractor shall at that time give written notice thereof to the contracting officer. If additional funds can be made available, the contracting officer may issue an additional fund reservation as provided for in Subparagraph d. hereof. It is expressly understood, however, that the Government has no obligation to provide funds in addition to those reserved in writing. The contractor is also cautioned that the prosecution of the work at a rate that will exhaust the funds reserved before the end of the fiscal year will be at his own risk. If additional funds cannot be made available, the contracting officer will give written notice thereof to the contractor. If at any time funds are being made available by appropriations for interim periods prior to the enactment of an Appropriation Act, the contractor will be so advised in writing in which case the other notice requirements of this subparagraph will not apply.

If the contractor so elects, he may continue work under the conditions and restrictions of the specifications after funds have been exhausted, so long as there are funds for inspection and supervision, con-

cerning which he will be notified in writing. No payment will be made for any work done after funds have been exhausted unless and until sufficient additional funds have been provided by the Congress. When funds again become available, the contractor will be notified in writing as to the amount thereof reserved for payments under this contract. The amount so reserved shall be subject to decrease or increase in a manner similar to that provided in Subparagraphs c. and d. hereof. However, if the contractor so elects, the work may be suspended when the available funds have been exhausted. Should work be thus suspended, additional time for completion will be allowed equal to the period during which the work is necessarily so suspended.

f. The procedure above described in this paragraph shall be repeated as often as necessary on account of exhaustion of available funds and the necessity of awaiting the appropriation of additional funds by Congress.

g. Should Congress fail to provide the expected additional funds during its regular session, the contract may, at the option of the contractor, by written notice, be terminated and considered to be completed without prejudice to him or liability to the Government at any time subsequent to 30 days after payments are discontinued, or subsequent to 30 days after passage of the Act which would ordinarily carry an appropriation for continuing the work, or after adjournment of the Congress which failed to make the necessary appropriations.

## 15. CONSTRUCTION PROGRAM

Within forty-five (45) calendar days after date of receipt of notice of award of contract, the contractor shall submit to the authorized representative of the contracting officer for approval a complete and practicable construction program. The construction program shall show in detail his proposed program of operations and shall provide for orderly

performance of the work. Pending approval of his program the contractor shall proceed with the work in accordance with these specifications and his proposed construction program.

The construction program shall be in such form and detail as to show the following:

- a. Sequence of operations.
- b. The dates for commencing and completing the work on the several controlling features of the project. (Including erection of construction plant and each item or group of like items involving placement of concrete, if applicable.)
- c. The dates of issuance of orders for procurement of contractor-furnished materials and equipment and their delivery and installation dates.
- d. The dates on which contractor-prepared drawings will be submitted for approval (including all shop drawings as required in these specifications).

The construction program shall be in suitable form and show the percentage of work for each line item scheduled for completion each month, and shall include the contractor's estimate of earnings by months. The contractor's estimate of earnings by months shall not obligate the Government to provide funds in any manner other than as provided in the paragraph of these specifications entitled "Funds Available for Earnings."

An original or translucent reproducible and three blackline prints of each construction program and each revised program shall be submitted. Originals or reproducibles shall be of such quality as to permit clear, sharp, legible prints to be made by direct-contact methods.

The contractor shall enter on the program the actual progress at the end of each progress payment period or at such other intervals as directed by the con-

tracting officer, and shall submit two such marked prints of the program to the contracting officer's authorized representative.

Timely submittal of the construction program and timely revisions thereto are important. The Government must have the information contained in the construction program for such purposes as scheduling the preparation of additional drawings required for construction purposes, delivery of Government-furnished materials and equipment, scheduling services of inspectors and survey crews. Accordingly, the contractor will be assessed as fixed, agreed and liquidated damages the sum of twenty dollars (\$20) per day for each calendar day's delay the contractor's original construction program is late. Further, should the contracting officer notify the contractor in writing that a revision of the construction program is required then liquidated damages in the amount of twenty dollars (\$20) per day will be assessed for each calendar day beyond thirty (30) calendar days, after receipt of such notification, that the contractor fails to submit the required revision.

If the contractor elects to program the work by the Critical Path Method (CPM), or by a similar type of network analysis system, he shall submit such program in lieu of the program specified above including all information required above. The contractor shall submit translucent reproducibles of the network diagram and of print-out or computation sheets for such construction program. Reproducibles shall be of such quality as to permit clear, sharp, legible prints to be made by direct-contact methods. If requested, the contractor shall also furnish a printout of the computer data.

**FINAL DECISION OF THE SOLICITOR IN THE MATTER OF THE ELIGIBILITY OF MR. JAMES R. KYPER TO REPRESENT EASTERN ASSOCIATED COAL CORP. AND AFFINITY MINING COMPANY BEFORE THE DEPARTMENT OF THE INTERIOR\***

**Practice Before The Department:  
Persons Qualified To Practice**

An individual not otherwise entitled to practice before the Department who is a full-time employee of two affiliated corporations may represent the corporations before the Department on the basis of the regulation (predicated upon statutory authority), which provides that an officer or a full-time employee of a corporation is qualified to practice before the Department on behalf of the corporation with respect to a particular matter.

**Federal Coal Mine Health and Safety Act of 1969: Hearings: Powers of Administrative Law Judges**

Where an individual complied with the "self-certification" requirements of the regulations, actions by an Administrative Law Judge in determining that an individual was ineligible to practice before Department and by the Board of Mine Operations Appeals to continue further consideration of the appeal pending a decision on the issue by the Solicitor, were unauthorized since the denial of an individual's right to practice before the Department in these circumstances constituted a disciplinary action which is within the sole authority of the Solicitor to adjudicate; therefore, the matter should have been referred to the Solicitor

at the outset and the appeal should not have been delayed without the express approval of the Solicitor.

M-36883

February 9, 1976

*OPINION BY DEPUTY  
SOLICITOR LINDGREN  
OFFICE OF THE SOLICITOR*

**TO: SOLICITOR.**

**SUBJECT: FINAL DECISION OF THE SOLICITOR IN THE MATTER OF THE ELIGIBILITY OF MR. JAMES R. KYPER TO REPRESENT EASTERN ASSOCIATED COAL CORPORATION AND AFFINITY MINING COMPANY BEFORE THE DEPARTMENT OF THE INTERIOR.**

*Statement of Facts:*

This matter was first formally referred to the Solicitor by memorandum dated Oct. 21, 1975, from the Chief Administrative Judge, Board of Mine Operations Appeals, and a Memorandum Opinion Order issued the same date by the Board (IBMA 76-43), for determination by the Solicitor pursuant to 43 CFR, Part I of the eligibility of Mr. James R. Kyper to practice before the Department of the Interior.

The files forwarded to the Solicitor by the Chief Administrative Judge indicate that three Applications for Review under section 105 (a) of the Federal Coal Mine Health and Safety Act of 1969 were received by the Department from Eastern Associated Coal Corpora-

\*Not in Chronological Order.

tion and docketed by the Chief Administrative Law Judge on May 13, 1975.<sup>1</sup> The three Applications for Review were executed by "James R. Kyper, Legal Assistant, Eastern Associated Coal Corporation, 1728 Koppers Building, Pittsburgh, Pennsylvania 15219." The Office of the Solicitor (Division of Mine Health and Safety), the attorney for the United Mine Workers of America, and Mr. Kyper were duly notified of receipt and docketing.

The three referenced Eastern cases, and one additional related case involving Affinity Mining Company,<sup>2</sup> were assigned to Administrative Law Judge Franklin R. Michaels. Thereafter, on June 6, 1975, Mr. Michaels issued a "*Notice of Hearing and Order for Prehearing Discovery*." As a footnote to the June 6 Order, Mr. Michaels noted that each of the four Applications for Review had been signed by Mr. Kyper and directed that unless a "full showing" was made that Mr. Kyper was qualified to represent two separate companies before the Department under the provisions of 43 CFR Part I, Mr. Kyper would "\* \* \* be barred from participation in those proceedings." On June 27, 1975, Mr. Michaels issued an "*Order to Show Cause*" in the four referenced cases to the two applicants directing them to "Show \* \* \* why James R. Kyper should not be declared ineligible to appear on their behalf in these proceed-

ings." The June 27 Order made reference to a letter transmitted to Mr. Michaels on June 13, 1975, by Mr. Thomas E. Boettger, General Counsel for Eastern Associated Coal Corporation, apparently discussing Mr. Kyper's employment status. Mr. Michaels deemed Mr. Boettger's letter of June 13 an inadequate response to his June 6 Order. A copy of the June 13 letter was not included in the files forwarded to the Solicitor; however, in view of facts later elicited, that omission is considered irrelevant to disposition of the issue before us.

A hearing on the "*Order to Show Cause*" was conducted by Mr. Michaels on Aug. 1, 1975. Present were Mr. Boettger, and a representative of the Office of the Solicitor (Division of Mine Health and Safety) on behalf of the Mining Enforcement and Safety Administration. A transcript was made of that hearing.<sup>3</sup> Portions of that transcript are relevant to resolution of the single question presented, *i.e.*, the eligibility of Mr. Kyper to represent both Eastern and Affinity before the Department. Pertinent statements and information set forth therein which we accept as accurate in the absence of controverting allegations or evidence are set forth below.

Thomas Boettger is the General Counsel of the Eastern Association Coal Corporation, as well as the Affinity Mining Company, and Sterl-

<sup>1</sup> Docket Nos. HOPE 75-790, 75-791, and 75-792.

<sup>2</sup> Docket No. HOPE 75-789.

<sup>3</sup> References herein to a transcript (TR) are to the transcript of the August 1, 1975 hearing.

ing Smokeless Coal Company, the latter two of which are wholly owned subsidiaries of the former (TR-22). The three companies are all "coal mining companies" (TR-40), incorporated under the laws of West Virginia, and separate corporate entities. Apparently the sole purpose for the creation of separate corporations in this instance is to facilitate financing of their respective operations, and is not an uncommon arrangement in the coal mining industry.<sup>4</sup> Neither Affinity nor Sterling actually have employees (TR-26) and all of the officers of Eastern are officers of Affinity and Sterling (TR-23). The three companies are the alter ego of each other (TR-23), and under the laws of West Virginia, Eastern would not be able to set itself legally apart from Affinity or Sterling (TR-27). Further facts elicited indicate that Mr. Kyper works in excess of eight hours a day, 40 hours a week, for 12 months a year (TR-6) for Eastern and its two wholly owned subsidiaries (TR-40). As such, Mr. Kyper has authority flowing from Mr. Boettger to appear on behalf of Eastern and its two wholly owned subsidiaries (TR-17) in mine health and safety matters before all levels of

the Office of Hearings and Appeals of this Department (TR-16).

In addition to the substantive matters set forth hereinabove, Mr. Boettger made a continuing objection to the entire proceedings which will be discussed in more detail below. The gist of Mr. Boettger's continuing objection was that Mr. Michaels was without authority under 43 CFR, Part I to raise the issue of Mr. Kyper's eligibility to practice before the Department (TR-3) in that only the Solicitor has the authority to raise and resolve that issue. Mr. Michaels overruled Mr. Boettger's objection (TR-3, 4).

#### *Decision:*

It is the decision of the Solicitor that in the circumstances presented, Mr. Kyper is eligible under the provisions of 43 CFR 1.3(b) (3) (iii) to represent formally and informally Eastern Associated Coal Corporation and Affinity Mining Company before the Department of the Interior.

The pertinent regulations<sup>5</sup> are predicated upon and implement sec. 5 of the Act of July 4, 1884, 23 Stat. 101, 43 U.S.C. § 1464 (1970), which Act grants to the Secretary of the Interior the authority to prescribe regulations governing the recognition and the exclusion of " \* \* attorneys, agents, or other

<sup>4</sup> Information informally provided by Mr. Boettger to Moody R. Tidwell, Associate Solicitor, General Law, during preparation of this decision.

<sup>5</sup> 43 CFR, Part I.

persons \* \* \* representing claimants before the Department. The law states that in order to be recognized such representatives must show, among other things, that they " \* \* possess the necessary qualifications to enable them to render such claimants valuable services, and otherwise competent to advise and assist such claimants \* \* \*." The Secretary may exclude recognition only after a hearing and upon a finding that said attorney, agent, or other person is shown to be incompetent or disreputable, refuses to comply with said rules and regulations, or intends to defraud, mislead, etc., the person whom he purports to represent.

The Secretary has determined that, in general, any person falling within several extremely broad classifications may appear before the Department unless prevented from doing so by the provisions of 18 U.S.C. §§ 203, 205, or 207 (1970), or unless excluded by disciplinary action under 43 CFR 1.6.<sup>6</sup>

Subparagraph 1.3(b)(3)(iii) of the regulations, indicates that any individual who is not otherwise

authorized to practice before the Department may practice in connection with a particular matter on behalf of a corporation or business if such individual is an officer or full-time employee of the corporation. It is this provision of the regulation which we are of the opinion allows Mr. Kyper to practice before the Department.

The generally understood concept of "employee" is one who performs services for another and the latter has the right to control and direct the former with respect to the details of performance and the results to be accomplished. Blacks Law Dictionary (4th Ed. 1957), "employee," citing *Young v. Demos*, 28 S.E. 2d 891, 893 (1944). The traditional understanding of employment presupposes a "loyalty" by the employee to an employer and a strong belief that an individual cannot work full-time for more than one employer, because his responsibility, or "loyalty," to two or more diverse employers would become entangled, thereby rendering the individual incapable of performing fully or adequately for either employer. The theory is, of course, rendered inapplicable where the employers' interests are mutual or where the employee would not otherwise be forced to decide between two divergent "loyalties." This is especially true where the duties include representation of two affiliated corporate employers who have a commonality of interest, and one of the corporate employers having no employees of its own uses, exclusively,

<sup>6</sup> The provisions of sec. 1.3(a) "Who May Practice" state:

"(a) Only those individuals who are eligible under the provisions of this section may practice before the Department, \* \* \*."

"(b) Unless disqualified under the provisions of sec. 1.4 or by disciplinary action taken pursuant to sec. 1.6:

\* \* \*  
 "(3) An individual who is not otherwise entitled to practice before the Department may practice in connection with a particular matter on his own behalf or on behalf of \* \* \* (iii) a corporation, business trusts, or an association, if such individual is an officer or full-time employee \* \* \*."

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the services of employees of the other. In addition, the concept of "joint employer" has been recognized by the courts in deciding issues relating to enforcement of specific labor statutes. For example, the court held in *NLRB v. Jewell Smokeless Coal Corporation*, 435 F.2d 1270 (4th Cir. 1970), that under the National Labor Relations Act, defendant possessed and exercised sufficient indicia of control over the employees of one of its operating contractors as to be treated as a "joint employer" of the employees of the latter. While the concept of joint employer is limited and not necessarily controlling in this instance, we nevertheless take the position that the concept is valid and proper for consideration.

The Secretary's regulations governing practice before the Department must be liberally construed and not applied in such a manner as to unreasonably deny any claimant the right to be represented by the individual of his choosing in the absence of a clear showing of a violation of the criteria identified in 43 U.S.C. § 1464 (1970).

Accordingly, for the purpose of resolving the issue of whether Mr. Kyper may properly appear on behalf of both Eastern and Affinity as a "full-time employee" it is my opinion that in the identified circumstances, Mr. Kyper is a full-time employee of both Eastern and

Affinity and under 43 CFR, Part 1, may represent both corporations before the Department in his assigned areas of responsibility.

We are not dissuaded from this opinion by the fact that Mr. Kyper represents both corporations in a relatively large number of "particular matters." The law obviously contemplates that "agents" and "other persons" may appear in a representative capacity before the Department. It is not the intent of the regulations to limit that statutory right solely to persons other than attorneys who were "formally admitted prior to Dec. 31, 1963."<sup>7</sup> Yet a restrictive reading of the regulations, such as proposed by Mr. Michaels would lead to that very conclusion. To this we cannot adhere, and it is our decision, at least as to corporate representation, that the phrase "particular matter" is not self-limiting. As to Mr. Kyper, the "particular matters" within his area of responsibility are limited to representation of Eastern and Affinity in mine health and safety matters before the Office of Hearings and Appeals. Mr. Kyper does not purport to represent those corporations in all matters before the Department, as Mr. Boettger might, or in other particular matters. The Department should not and cannot limit Mr. Kyper's right to practice before the Office of Hearings and

<sup>7</sup> 43 CFR 1.3(b)(1).

Appeals to one, or a very few, mine health and safety matters, at least in response to any of the arguments or positions expressed or apparent in the instant case.

In passing upon this matter, it has come to our attention that procedures utilized in the first instance by Mr. Michaels to challenge Mr. Kyper's eligibility to practice before the Department were improper. As indicated above, Mr. Michaels issued a "Show Cause" notice to the referenced corporations requiring the *corporations* to show why Mr. Michaels should permit them to be represented by Mr. Kyper. Thereafter, a hearing was held, Mr. Michaels decided that Mr. Kyper was ineligible to practice before the Department, and the matter was appealed to the Board of Mine Operations Appeals.

As discussed above, it is clear that attorneys, agents, and other persons may practice before the Department in a representational capacity. Subparagraph 1.3(b) of the regulations states that unless disqualified by violation of law or by disciplinary action pursuant to section 1.6 thereof, persons so qualified thereunder shall be permitted to practice before the Department. Further, only the Solicitor may initiate proceedings leading to disciplinary action.<sup>8</sup> Since the only result of any successful challenge to the right of an individual to practice before the Department is to deny to that person the right so to practice, only the

Solicitor may formally challenge the right. The practice of requiring Eastern and Affinity to "Show Cause" why they cannot be represented by Mr. Kyper circumvents the authority of the Solicitor since Mr. Michaels' decision, while addressed to Eastern and Affinity, was in reality the denial of Mr. Kyper's right to practice before the Department under 43 CFR 1.3(b)(3)(iii), and as such was a disciplinary action as perceived in sec. 1.6 thereof.

The only course of action available to any officer or employee of the Department to challenge the right and authority of any "attorney, agent, or other person" to appear formally or informally before them is to address the issue to the Solicitor at the outset. In view of the "self-certification" provision of the regulation,<sup>9</sup> the only proper course of action open to Mr. Michaels to challenge Mr. Kyper's right to appear before him on behalf of Eastern and Affinity, notwithstanding cases to the contrary cited by Mr. Michaels, was to refer the matter to the Solicitor. Neither Mr. Michaels nor the Board of Mine Operations Appeals in continuing the referenced appeal of Eastern and Affinity pending this decision, acted within colorable authority of law.

Henceforth, challenges to the authority of an individual to practice before the Department under the provisions of 43 CFR, Part I, when the requirements of sec. 1.5 thereof

<sup>8</sup> 43 CFR 1.6(b).

<sup>9</sup> 43 CFR 1.5.

have been met, must be made concurrently with other ongoing actions, and those actions may not be stayed or otherwise delayed by reason of a challenge of authority under this part in the absence of express approval of the Solicitor.

This constitutes a final decision of the Solicitor and may not be appealed further within the Department of the Interior. It should be noted that other questions and issues of law and fact were raised by Mr. Michaels in his handling of the matter which have been considered, but, because they were not dispositive in any way of the principal issue, are accordingly not addressed herein. The files forwarded to the Solicitor in this matter are returned herewith to the Chief Administrative Judge, Board of Mine Operations Appeals, for necessary action.

DAVID E. LINDGREN,  
*Deputy Solicitor.*

## APPEAL OF AIRCO, INC.

IBCA-1074-8-75

Decided April 6, 1976

Contract No. 14-09-0060-3002, Bureau of Mines.

Motion to Strike Denied.

1. Contracts: Disputes and Remedies: Termination for Default: Generally—Rules of Practice: Appeals: Dismissal—Rules of Practice: Appeals: Failure to Appeal—Rules of Practice: Appeals: Motions

Where a construction contractor failed to appeal from a notice of termination for default which included findings that the contractor's delay in performing the work was not due to excusable causes, but did file a timely appeal from a damage assessment for, *inter alia*, the increased cost of completing the work, the Board denied the Government's motion to strike paragraphs of the complaint alleging that the contractor's delay was due to excusable causes and that the termination for default was improper since under the so-called *Fulford* doctrine, which has been held equally applicable to construction contracts, an appeal from a damage or excess cost assessment following a termination for default allows the contractor to contest the propriety of the termination.

2. Contracts: Disputes and Remedies: Termination for Default: Generally—Contracts: Performance or Default: Release and Settlement—Rules of Practice: Appeals: Dismissal—Rules of Practice: Appeals: Motions

Where certain paragraphs of a complaint filed by a construction contractor in an appeal from a damage assessment following a termination for default raised issues as to the propriety of the termination, the Board denied a Government motion to strike those paragraphs based on contentions that the contractor had agreed that delay in completion of the work was not excusable and that the contractor's agreement to a revised date for completion of the work precluded it from raising issues as to the excusability of delays occurring prior to the agreement, since it is well settled that accord and satisfaction is an affirmative defense which must be pleaded and proved and that allegations of accord and satisfaction raise factual issues as to the intent of the parties at the time of the alleged accord.

**APPEARANCES:** Messrs. W. Stanfield Johnson, Joseph M. Oliver, Jr., Attorneys at Law, Jones, Day, Reavis & Pogue, Washington, D.C., for the appellant; Mr. Thomas A. Garrity, Jr., Department Counsel, Amarillo, Texas, for the Government.

*OPINION BY ADMINISTRATIVE JUDGE NISSEN*

*INTERIOR BOARD OF CONTRACT APPEALS*

By motion appended to the Government's answer, dated Dec. 18, 1975, Department counsel seeks an order striking from the complaint filed by appellant, paragraphs 6, 7, 8, 17 through 64, 73, 75, 79, 80, 81 (a), 81(b) and 82(a) upon the ground that the allegations in these paragraphs constitute an attempt to appeal from the contracting officer's decision, dated Apr. 12, 1972, which terminated the contract for default. The motion recites that the timeliness of an appeal is solely a question of law and asserts that this Board lacks jurisdiction of such disputes. Appellant<sup>1</sup> vigorously contests this position alleging that disposition of the motion is controlled by the so-called "Fulford" doctrine.

The contract, awarded on Oct. 18, 1968,<sup>2</sup> as a result of two-step formal

advertising, required appellant to completely design, fabricate, furnish, install, and performance test (1) a conservation helium enriching unit, identified as Item 1A, (2) a helium purification unit, identified as Item 1B, and (3) a crude helium separation unit identified as Item II. Work was to be completed within 570 calendar days after receipt of notice to proceed. Notice to proceed was issued and receipt thereof acknowledged by the appellant on Nov. 4, 1968, thereby establishing May 28, 1970, as the date for completion of the work. The contract includes Standard Form 23-A (June 1964 Edition) with amendments to reflect the November 1967, revisions to Changes and Differing Site Conditions clauses and to include Clause 35, Suspension of Work. The contract provides for liquidated damages at the rate of \$200 for each calendar day of delay in completion of the work.

The following findings are based upon the present record and are, of course, subject to modification based upon the record after all the evidence has been received.

The record reflects that appellant experienced a number of difficulties in contract performance. However, it suffices to say for present purposes that the completion date was not met, that the contract was terminated for default under Clause 5 of the General Provisions by a notice, dated May 14, 1971, receipt of which was acknowledged by appellant on May 20, 1971, that the contract was reinstated on June 15,

<sup>1</sup> The award was to Airco/BOC Cryogenic Plants Corporation. The contractor has undergone a number of name changes and will be referred to herein as appellant.

<sup>2</sup> Although a letter, notification of award, forwarding the contractor's copy of the contract, is dated Oct. 18, 1968, the contract bears the date "9/18/68."

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1971,<sup>3</sup> that a revised completion date of Apr. 11, 1972, was agreed upon by the parties on Aug. 2, 1971, that this date was also not met and that the contract was again terminated for default under date of Apr. 12, 1972. Like the prior, rescinded termination,<sup>4</sup> the termination notice included an express finding that the default was not due to excusable causes. Appellant did not appeal the termination.

By telegram, dated Sept. 21, 1971, appellant was informed that the purification unit (Item 1B) as constructed did not conform to specifications and was rejected. Appellant was directed to remove and replace the unit pursuant to Article 10(b) of the General Provisions. Appellant did not comply with this directive.

A cost-type contract for the completion of the work was awarded to the M. W. Kellog Company on July 21, 1972. Kellog was apparently unable to offer firm assurances that correcting deficiencies in

the purification unit (Item 1B) would result in performance in accordance with contract requirements and in view of the substantial cost recommended that work to correct the deficiencies not be undertaken. This recommendation was accepted by the Bureau. Since it was estimated that a new purification unit would cost approximately \$1 million and that installation of the unit and modification of existing facilities to accommodate it would also cost \$1 million, replacement of the purification unit has not been accomplished. By letter, dated Mar. 12, 1975, appellant was informed that the contract price was reduced, pursuant to the guarantee clause, by the amount (\$842,950) allocated to Item 1B in a cost breakdown submitted by appellant subsequent to the award.

Contract work, to the extent accomplished, was completed on Aug. 8, 1974. Payments to M. W. Kellog, subcontractors and other third parties total \$967,799.75. Increased costs, apparently inspection and other unidentified operating costs incurred by the Bureau, have been computed at \$124,067.02. Liquidated damages computed from May 29, 1970, to and including Aug. 8, 1974 (1,533 days) at \$200 per day total \$306,600. The contracting officer's final decision, dated July 14, 1975, from which this appeal was taken determined that appellant was liable to the Government in the amount of \$1,916,148.77.

Paragraphs 6 through 8 of the complaint at which the motion to

<sup>3</sup> The contracting officer's letter of June 15, 1971, is as follows:

"Based upon the submissions and oral commitments to complete the work under Contract 14-09-0060-3002, I hereby rescind my notice dated May 14, 1971, which terminated Airco/BOC's right to proceed with the work. Airco/BOC shall proceed with completion of the work in accordance with the contract."

<sup>4</sup> The termination notice of May 14, 1971, included the following:

"Airco/BOC has failed to perform in accordance with the terms of the contract. The failure did *not* result from unforeseeable causes beyond the control and without the fault or negligence of Airco/BOC and its suppliers. The Contracting Officer has determined that the failure to perform is not excusable."

strike is directed allege in substance that after appellant submitted its initial technical proposal to the Bureau, several meetings were held at which Bureau representatives suggested changes in appellant's proposed design and in its technical proposal, that appellant modified its proposal as suggested by the Bureau and was subsequently notified by the Bureau that its technical proposal, modified as suggested, was acceptable.

The next paragraphs (17 through 64) involved in the motion to strike are concerned principally with alleged excusable causes of delay *e.g.*, various listed national strikes, unusually severe weather, and numerous failures of the Bureau to comply with contractual commitments and express and implied obligations concerning, *inter alia*, the furnishing of feed gas, inspection, testing and cooperation with appellant in performing the work. Paragraphs 32 through 36 of the complaint are concerned with the initial termination, reinstatement of the contract and the parties agreement on a revised completion date of Apr. 11, 1972. In Paragraph 62, it is alleged that Item 1B was impossible to fabricate and install within the specifications and other constraints of the work.

Paragraph 73 alleges that appellant is not liable for damages and costs after Apr. 12, 1972, because the termination was erroneous, Paragraph 75 alleges that appellant is not liable for liquidated damages because any failure of appellant to

perform in accordance with the contract schedule was excusable. Paragraph 79 alleges the invalidity of the termination as a matter of law. Paragraph 80 alleges that the burden of proving the default is on the Bureau and Paragraphs 81(a) and 81(b) repeat the allegations of Paragraphs 73 and 75 and 79 concerning the invalidity of the termination and the excusability of appellant's failure to perform. Paragraph 82(a) repeats the allegation that the Bureau has the burden of proving that the default was proper.

#### *Decision*

The motion to strike as well as Department counsel's initial brief in support thereof leave little doubt that the motion, as initially filed, was based upon the asserted finality of the termination of Apr. 12, 1972, including all facts required to support it, resulting from appellant's failure to appeal the termination. In this posture of the case, it is not surprising that resistance to the motion has centered upon the applicability of the so-called "Fulford" doctrine.

This Board does not appear to have had occasion to consider the application of the Fulford doctrine, which stems from the ASBCA decision in *Fulford Manufacturing Company*, ASBCA No. 2144 (May 20, 1955), 6 CCF par. 61,815. The doctrine as generally stated permits the contractor to raise issues as to the propriety of the termination for default in an appeal from an assessment of excess costs even

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though no appeal was taken from the termination and even though the termination may have included findings that the contractor's default was not due to excusable causes.<sup>5</sup> Although an early ASBCA decision,<sup>6</sup> indicated that issues concerning whether offered supplies complied with contract requirements were not within the scope of the rule, it is now clear that this decision does not represent the law.<sup>7</sup> The *Fulford* doctrine having been applied in numerous cases and having been generally accepted as proper (note 7, *supra*), this Board would hardly be free to disregard the rule in an appropriate case even if it disagreed with the decision.

<sup>5</sup> In *Fulford* the notice of termination issued by the contracting officer included, *inter alia*, findings that the contractor's delay of 2 months in placing an order for materials and difficulty in making tools and keeping them in proper working condition were solely within the contractor's control and the following determination "That your delay in failure [*sic*] to make deliveries has been due to causes within your control and due to your fault or negligence."

<sup>6</sup> *Virginia Dare Extract Company, Inc.*, ASBCA No. 4916 (Apr. 24, 1959), 59-1 BCA par. 2188. Department counsel cites *Virginia Dare* as support for the statement that "Even the ASBCA agrees that the '*Fulford*' doctrine, which it created, does not apply to 'excusable delay' issues." We observe that excusable delay issues are precisely what the *Fulford* doctrine is all about.

<sup>7</sup> See *Universal Lumber Company*, ASBCA Nos. 9412 and 9718 (Feb. 28, 1966), 66-1 BCA par. 5421 and cases cited, footnote 4. Indeed, it appears that an attempt to draw just such a distinction, *i.e.*, between excusable delay issues and issues as to the conformance of offered supplies to contract requirements, precipitated the Comptroller General's ruling (44 Comp. Gen. 200 (1964)) that the *Fulford* doctrine, having gained general acceptance through the passage of time, should be the interpretation of the Default clause adopted by all Boards, where the clause was in substance the same.

The question here is whether the rule is equally applicable to construction contracts.

[1] While counsel for appellant has cited one decision so holding,<sup>8</sup> we note that the Board in *Fulford* was at some pains to point out that in the contract before it the Government's right to terminate was not conditioned upon a determination that the default was not due to excusable causes, that there was no express provision for extending the contract delivery date to compensate for delay due to excusable causes and that there was no express time in which the excusability determination need be made. This, of course, is not the contract before us, since Clause 5 of the General Provisions applicable to construction contracts provides that the contract will not be terminated or the contractor charged with resulting damage if the delay was due to excusable causes, provided the contractor within 10 days from the beginning of delay notifies the contracting officer in writing of the causes of delay. The clause expressly empowers the contracting officer to extend the completion date when in his judgment the findings of fact justify such an extension and provides that the findings of fact are final and conclusive subject only to the contractor's right of appeal provided by the Disputes clause. It

<sup>8</sup> *Jack W. West Contracting Co., Inc.*, GSBCEA No. 3837 (April 22, 1974), 74-1 BCA par. 10,599. In a footnote the Board stated it saw no sound reason for excluding construction contracts from application of the rule.

therefore becomes necessary for us to determine whether the cited differences are crucial to the basic rationale of *Fulford* so that the rule is inapplicable to construction contracts. For the reasons hereinafter appearing, we conclude that the noted differences between the language of supply and construction contracts do not mandate a different result,<sup>9</sup> and that the *Fulford* rule may be held applicable to construction contracts.

At the outset, we observe that if the contracting officer made a findings and determination of excusable delay and extended the completion date in accordance therewith, or conversely, denied a requested extension based on alleged excusable delay, such an unappealed findings (containing the proper notice of the contractor's right of appeal) would not be subject to question in a later appeal from a damage assessment for the increased cost of completing the work. This rule is, of course, equally applicable to supply contracts. With respect to the 10-day notice of delay requirement of Clause 5, it has long been held that the contractor's failure to give the specified notice will not preclude consideration of the merits of delay

claims where it appears that the contracting officer had actual knowledge of the causes of delay.<sup>10</sup> This principle, being widely applied and generally accepted, is, in our opinion, a circumstance properly for consideration in determining the meaning a reasonable contractor might give to Clause 5 in relation to its right to raise issues of excusable delay in an appeal from a damage assessment for the increased cost of completing the work subsequent to a termination.<sup>11</sup>

It is, of course, true that Clause 5 and the applicable regulation<sup>12</sup> prohibit termination for default if the delay is determined to be excusable. While this contemplates that issues of excusable delays will be considered prior to termination which is not necessarily the case as to supply contracts,<sup>13</sup> this circumstance should not alter what is considered to be a reasonable construction of Clause 5 or Clause 11 (supply contracts) by a contractor who receives a notice of termination containing express findings that the de-

<sup>10</sup> *Allied Contractors, Inc.*, IBCA-265 (May 16, 1961), 68 I.D. 145, 61-1 BCA par. 3047. See also *Lormack Corporation*, IBCA-652-7-67 (Nov. 13, 1969), 69-2 BCA par. 7989.

<sup>11</sup> It is well settled that the language of a contract is to be given that meaning which would be derived from the contract by a reasonably intelligent person acquainted with the contemporaneous circumstances. *Hol-Gar Manufacturing Corp. v. United States*, 169 Ct. Cl. 384 (1965).

<sup>12</sup> See FPR 1-18.803-5, 41 CFR 1-18.803-5 "Procedure in case of default" applicable to construction contracts.

<sup>13</sup> See FPR 1-8.602-3, 41 CFR 1-8.602-3 "Procedure in case of default" applicable to supply contracts. See, e.g., *Legion Utensils Co., Inc.*, GSBGA No. 2732 (Sept. 18, 1969), 69-2 BCA par. 7896 (on reconsideration).

<sup>9</sup> We conclude that the reason for the ASBCA's emphasis in *Fulford* upon the fact that the right to terminate was not conditioned upon a finding the causes of delay were not excusable, that there was no express time in which an excusability determination need be made and that there was no express provision for extending the delivery schedule to compensate for delay determined to be excusable was to distinguish the Board's prior holdings contrary to the result reached in *Fulford*.

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fault was not due to excusable causes. Obviously, the clause contemplates that the contracting officer may err in determining that the delays are not due to excusable causes.

We conclude that the crux of *Fulford* lies in the conclusion that "A reasonable contractor reading paragraph (e) might well construe it to mean that regardless of what was said in the contracting officer's decision to terminate for default under paragraph (a), he could at a later time raise the issue of excusability." (Opinion at 14.) There is no material difference between Paragraph (e) of Clause 5 and Paragraph (e) of the Default clause applicable to supply contracts. While there may be circumstances calling for a contrary conclusion,<sup>14</sup> we agree with the GSA Board (note 8, *supra*), that in general there is no sound reason why the *Fulford* rule should be held inapplicable to construction contracts.

Little needs to be said concerning Department counsel's assertion that the timeliness of an appeal is a question of law over which this Board has no jurisdiction, since we consider that we have inherent authority to determine our jurisdiction. Even if the question of timeliness of an appeal is solely one of

law, counsel's contention confuses the finality of our decision with our authority to make it. The ASBCA long ago disposed of a similar contention.<sup>15</sup>

Anticipating an adverse decision on the *Fulford* issue, counsel now argues that although the contracting officer rescinded the termination of May 14, 1971, he did not rescind his findings that the default was not due to excusable causes, and that those findings are now final. This position is clearly untenable. As we have found, appellant acknowledged receipt of the termination notice of May 14, 1971, on May 20, 1971, and the termination was rescinded on June 15, 1971, well within the 30-day appeal period. Whether the contracting officer intended to rescind the findings of nonexcusability is immaterial, since once the termination was rescinded the question of whether the default was excusable was no longer in issue. We think the contracting officer would have been surprised had appellant filed an appeal from the findings of nonexcusability of the default after the termination was rescinded and that a clearer case of inducing a contractor to sleep on his appeal rights could hardly be imagined. Accordingly, we hold that the termination of May 14, 1971, and all findings contained therein were nullified when the termination

<sup>14</sup> See, e.g., *Ardelt-Horn Construction Company*, ASBCA No. 14550 (Jan. 22, 1973), 73-1 BCA par. 9901, reversed in part; *Ardelt-Horn Construction Co. v. United States*, Ct. Cl. No. 166-73 (June 27, 1975), 21 CCF par. 84,096, upon the ground that consideration of the merits of delay claims constituted a waiver of the 10-day notice of delay provision.

<sup>15</sup> *Lockheed Aircraft Corporation*, ASBCA No. 9396 (Feb. 26, 1965), 65-1 BCA par. 4689. See also, *Bowen-McLaughlin-York, Inc.*, ASBCA No. 13068 (Oct. 20, 1969), 69-2 BCA par. 7964.

was rescinded within the appeal period.

[2] Alternatively, it is alleged that appellant agreed with the findings in the termination notice of May 14, 1971, that the default was not due to excusable causes. Support for this contention is found in letters dated June 1, and June 15, 1971, referring to corrections of deficient equipment at appellant's expense, and acknowledging that modifications to meet contractually specified performance would be at appellant's expense. These letters indicate that appellant recognized certain deficiencies in the equipment were its responsibility. However, we note that the letter agreement of Aug. 2, 1971, establishing Apr. 11, 1972, as the revised date for completion of the work includes a reservation of all rights and remedies provided in the contract by both appellant and the Government. This equivocal evidence would hardly support a finding that appellant had agreed that delays prior to the termination of May 14, 1971, were inexcusable under the contract. Even if appellant had so agreed, we know of no principle absent accord and satisfaction or a change of position by the Government and resulting prejudice, which would preclude appellant from changing its mind on this issue.

It is, of course, a well-settled principle that agreement on a revised delivery or completion date may preclude a contractor from contesting the excusability of

delays occurring prior to the agreement.<sup>16</sup> However, it is equally well settled that accord and satisfaction is an affirmative defense which must be pleaded and proved and that allegations of accord and satisfaction raise factual issues as to the intent of the parties at the time of the alleged accord.<sup>17</sup> It follows that an issue of accord and satisfaction is not properly decided upon what is in effect a motion to dismiss.

### *Conclusion*

The motion to strike is denied. Department counsel will have 30 days from the receipt of this decision in which to file an answer to the paragraphs of the complaint at which the motion to strike was directed.

SPENCER T. NISSEN,  
*Administrative Judge.*

I CONCUR:

WILLIAM F. MCGRAW,  
*Chief Administrative Judge.*

<sup>16</sup> *C. A. Davis, Inc.*, IBCA-960-3-72 (June 12, 1973), 73-2 BCA par. 10,093; *Crane Company*, ASBCA No. 16999 (Mar. 14, 1973), 73-1 BCA par. 9961 and cases cited. *Cf. Lormack Corporation* (note 10, *supra*) (consideration of merits of a claim for a time extension based upon Government delay in resolving a conflict in drawings not precluded by contractor's acceptance of a change order concerning other matters).

<sup>17</sup> See, e.g., *Blake Construction Co.*, GSBICA No. 2283 (Dec. 29, 1967), 68-1 BCA par. 6779. See also, *John A. Volpe Construction Co., Inc.*, GSBICA No. 2570 (Jan. 5, 1970), 70-1 BCA par. 8070, and *Aero-Jet General Corp.*, ASBCA No. 13372 (June 25, 1973), 73-2 BCA par. 10,164. *Cf. Edo Corporation*, ASBCA No. 15968 (Aug. 1, 1973), 73-2 BCA par. 10,228 (7-day hearing held on scope of release).

*April 6, 1976***ESTATE OF ELIZABETH C. JENSEN  
McMASTER****5 IBIA 61***Decided April 6, 1976***Appeal from an order denying petition  
for rehearing.****Dismissed.****1. Indian Probate: Trust Property:  
Generally—415.0**

Where trust patents for allotments for lands were issued in conformity with the General Allotment Act and contained usual provision that the United States would hold lands subject to statutory provisions and restrictions for a period of years, in trust for the sole use and benefit of Indians, and lands were chiefly valuable for their timber, the restraint upon alienation, effected by terms of trust patents, extended to timber and proceeds derived therefrom as well as to lands.

**APPEARANCES:** Oberquell and Ahlf, by Argal D. Oberquell, Esq., for appellant.

**OPINION BY ADMINISTRATIVE JUDGE SABAGH**

**INTERIOR BOARD OF  
INDIAN APPEALS**

This case is before the Board on appeal from an order of Administrative Judge Robert C. Snashall, denying petition for rehearing.

The decedent, Elizabeth Jensen McMaster, an allotted Quinault, died intestate possessed of trust property on July 1, 1974. After hearing held at Tacoma, Washington, on May 21, 1975, the Adminis-

trative Law Judge found the heirs of the decedent, in accordance with the laws of the State of Washington, to be:

Raymond C. McMaster—Non-Indian-husband— $\frac{1}{2}$  (Non-trust)

Ivan Keith Farrow, son— $\frac{1}{6}$

Bruce Dennis Farrow, son— $\frac{1}{6}$

Dennis Merle Farrow, grand-son— $\frac{1}{6}$

The trust property belonging to the decedent at the time of her demise consisted of decedent's allotment described as: SW  $\frac{1}{4}$  NE  $\frac{1}{4}$  Sec. 18, T. 22 N., R. 11 W., and NW  $\frac{1}{4}$  SE  $\frac{1}{4}$  Sec. 7, T. 22 N. R. 12 W., W.M., Washington, consisting of 80 acres, and approximately \$351,947.99 on deposit in her Individual Indian Money Account, apparently the proceeds from the sale of timber on said land allotment.

At the hearing, the decedent's surviving spouse submitted for consideration an agreement entitled Community Property Agreement, executed by the decedent and her surviving spouse on July 24, 1973, before a notary of Olympic, Washington. The agreement was not approved by the Secretary of the Interior, and there is no evidence in the record that it was ever presented to him for his approval.

The community property agreement referred to above, in substance provides that:

1. All community property presently owned by the parties or hereafter acquired by them shall be sub-

ject to the terms and conditions of this agreement.

2. At the time of the death of either of the parties hereto, any separate property of the person passing away shall be deemed at that time to have the status of community property and be included as a part of community property of the parties subject to the terms and conditions hereof.

3. Upon the death of either of the parties hereto title to all community property as herein defined shall immediately vest in fee simple in the survivor.

The Judge essentially found that the community property agreement was null and void because the agreement was not approved by the Secretary of the Interior since the allotted lands and the proceeds derived from the sale of the timber thereon were impressed with a trust, the trustee being the Secretary of the Interior.

A petition for rehearing was thereafter denied by the Judge. Whereupon, the surviving spouse filed a timely appeal, contending the community property agreement was valid. He further contends that by virtue of this agreement, all moneys in the IIM account and the allotted land belonging to the decedent passed to the surviving spouse immediately upon her death; and that in addition, the individual Indian moneys that accrued from timber sales prior to the death of his late wife should have been paid out to her because she was never mentally incompetent though she was physi-

cally disabled from a stroke in June 1972.

We consider the crux of this case to hinge on whether or not the decedent, an Indian married to a non-Indian, may enter into a contract regarding the alienation of trust property without the consent and approval of the Secretary of the Interior.

By virtue of the Act of Feb. 8, 1887, hereinafter referred to as the General Allotment Act, and other statutory enactments, certain lands were allotted and trust patents issued relating to individual Indians, including the decedent. The patents contained the usual restrictions against alienation of title and inability to contract, and provided that the United States would hold the title in trust for the allottee for a period of 25 years. *See* 25 U.S.C. § 348, 24 Stat. 389.

The trust period was extended by Executive Order and the restrictions have never been removed. *See* Executive Order No. 10191, Dec. 13, 1950, 15 FR 8889.

The General Allotment Act further provides that the Secretary of the Interior may in his discretion whenever he is satisfied that an Indian allottee is competent and capable of managing his or her affairs issue a patent in fee simple. 25 U.S.C. § 349, sec. 6 of the Act.

An Indian, competent and capable of managing his affairs, must at least have sufficient ability, knowledge, experience, and judgment to enable him to conduct negotiations for the sale of his land, and

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to care for, manage, invest or dispose of its proceeds with a reasonable degree of prudence and wisdom and an uneducated Indian, inexperienced in business affairs is incapable of managing his affairs, and especially incompetent to sell his land and handle the proceeds thereof. *U.S. v. Debell*, 227 F. 760 (8th Cir. 1915).

The judgment of the Secretary of the Interior as to removing restrictions upon alienation of Indian allotted lands will not be disturbed by the courts, unless clearly arbitrary. *United States v. Lane*, 258 F. 520 (1919); *see also*, 25 U.S.C. § 331 *et seq.*, 406 (1970).

As the trustee of the Indians, the Secretary of the Interior administers the trust that arose by virtue of the General Allotment Act and he has the right to administer the trust as he sees fit and terminate it when he gets ready. He has the right to discharge himself of the trust by paying the money to the allottee or to a legally appointed guardian, provided there is nothing in the law prohibiting it.

So long as the lands and their proceeds are held or controlled by the United States, and the terms of the trust have not expired, they are instrumentalities employed by the United States in the lawful exercise of its powers of government to protect Indians. It does establish the rule that the proceeds of the sale are impressed with the same trust that existed upon the land, but only inso-

far as the United States retains the possession or control of same.

The Act of May 27, 1902, 32 Stat. 275, sec. 8, authorizes the adult heirs of any deceased Indian to whom allotted lands have been patented to sell inherited lands subject to the approval of the Secretary of the Interior and provides that when so approved full title shall pass to the purchaser, the same as if a final patent without restriction on the alienation had been issued.

It has been consistently held that where lands were allotted under the General Allotment Act restraining alienation, the Act of 1902 did not vacate the trust of such lands held by the United States, but, on the sale of the lands with the consent of the Secretary of the Interior by the heirs of the deceased allottee, the trust becomes attached to the proceeds, which are payable to such heirs under rules prescribed by the Interior Department. The statute provides that the land may be sold with the consent of the Secretary of the Interior. It thus permits a change in form of the trust property from land to money. This change may only be effected with the consent of the trustee represented in the person of the Secretary of the Interior. No citation of authority is needed to sustain the general doctrine that into whatever form trust property is converted, it continues to be impressed with the trust. That doctrine must be applied to the present case in the absence of the expressed intention of Congress not to end the trust but to permit a

change of the form of the trust property. *National Bank of Commerce v. Anderson*, 147 F. 87 (9th Cir. 1906); *United States v. Thurston County*, 143 F. 287 (8th Cir. 1906).

Restrictions imposed on alienation of Indian land are not personal to the allottee but run with the land. *United States v. Reilly*, 290 U.S. 33, 54 S. Ct. 41 (1933).

The granting of citizenship to an Indian allottee or his heirs does not affect property in trust pursuant to the Indian Allotment Act. *Spriggs v. United States*, 297 F.2d 460 (10th Cir. 1961).

[1] Where the United States holds allotted lands, subject to statutory provisions and restrictions in trust for sole use and benefit of Indians, and lands were chiefly valuable for their timber, the restraint upon alienation, effected by terms of trust patents, extended to timber and proceeds derived therefrom as well as lands. *United States v. Eastman*, 118 F.2d 421 (9th Cir.), *cert. denied*, 314 U.S. 635, 62 S. Ct. 68 (1941).

We find that the community property agreement, relating to allotted lands and proceeds derived therefrom, entered into by the appellant and the decedent without the consent and approval of the Secretary of the Interior is null and void for the reasons stated, *supra*.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, it is ordered that the Interim

Order and Final Order Determining Heirs entered June 5 and July 10, 1975, respectively, be, and the same are hereby, **AFFIRMED**, and the appeal herein is **DISMISSED**.

This decision is final for the Department.

MITCHELL J. SABAGH,  
*Administrative Judge.*

WE CONCUR:

ALEXANDER H. WILSON,  
*Administrative Judge.*

WM. PHILIP HORTON, *Member.*

#### APPEALS OF ARMSTRONG & ARMSTRONG, INC.

IBCA-1061-3-75 and  
IBCA-1072-7-75

Decided April 7, 1976

Contract No. 1406-D-7404, Specifications No. DC-6985, Bureau of Reclamation.

Cross Motions for Summary Judgment Denied; Stay of Proceedings Vacated; and Consolidation of Appeals Ordered.

1. Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: General Rules of Construction—Rules of Practice: Appeals: Hearings—Rules of Practice: Appeals: Motions

Cross motions for summary judgment are denied where the Board finds the stipulated record furnishes an insufficient basis for an informed judgment and that a

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hearing will be required for determining the merits of the entitlement question presented for decision.

**2. Rules of Practice: Generally—Rules of Practice: Appeals: Generally—Rules of Practice: Appeals: Motions**

A stipulation as to procedure only involving two appeals arising under the same contract is disregarded where following the submission of simultaneous briefs under a cross motions for summary judgment procedure, the Board finds some of the terms of the stipulation in which it had acquiesced to be at variance with the rule in the Court of Claims against the splitting of the cause of action under a single and indivisible contract and that adherence to the stipulation could be prejudicial to the contractor in certain foreseeable circumstances. The stay of proceedings provided for by the stipulation with respect to one appeal is therefore vacated and as a corollary to such action the appellant is directed to file its Complaint.

**3. Rules of Practice: Generally—Rules of Practice: Appeals: Generally—Rules of Practice: Appeals: Motions**

Finding that it has inherent discretion to order consolidation of appeals in appropriate cases, the Board orders the consolidation of two appeals which the appellant has asserted involve common questions of law and fact and which, in any event, arose under the same contract, involve the same attorneys and, presumably, the same witnesses.

**APPEARANCES:** Mr. William B. Moore, Attorney at Law, Ferguson & Burdell, Seattle, Washington, for the appellant; Mr. John P. Lange, Department Counsel, Denver, Colorado, for the Government.

**OPINION BY CHIEF ADMINISTRATIVE JUDGE McGRAW**

**INTERIOR BOARD OF CONTRACT APPEALS**

Appellant's counsel has taken vigorous exception to an Order<sup>1</sup> by which the appeals in IBCA-1061-3-75 and IBCA-1072-7-75<sup>2</sup> were consolidated for purposes of hearing (if one were held), briefing and decision and in which the appellant was directed to file the Complaint in IBCA-1072.

In the letter to the Board of February 5, 1976,<sup>3</sup> appellant's counsel says that he is "somewhat puzzled as to what the Board ultimately

<sup>1</sup> Order of the Board dated Jan. 13, 1976.

<sup>2</sup> Hereinafter referred to as IBCA-1061 and 1072, respectively, except where quoting from material in the record.

<sup>3</sup> Received by the Board on Feb. 12, 1976. The letter concludes:

"There are no facts beyond those discussed in the briefs of the parties that would change a legal determination by the Board in the disposition of either appeal. At the same time, we recognize that in any case there is always room for an elaboration of existing facts and exploration of background associated with those facts.

"Inasmuch as there are not major amounts of money involved in this appeal and mindful of the Board's desire that appeals be concluded as expeditiously and efficiently and at least expense to the parties as is possible, both counsel felt that the case was ripe for a decision on the entitlement issue on the record as it presently stands.

"If however the Board's ruling on the summary judgment now submitted for decision is that there must be a fuller exploration of the surrounding facts and circumstances, the Board's ruling could help both parties pinpoint the initial facts and assess their significance. This of itself would assure a more efficient hearing and would also materially contribute to the prospects of a settlement without necessity of a hearing.

"In short, the filing of a complaint in the second appeal will add nothing in aid of a

(Continued)

seeks to accomplish." The letter makes a number of other statements including the following: (i) that long before briefs were submitted counsel had discussed staying the second appeal pending the result of the first or consolidating the two; (ii) that the position of Government counsel was to stay the second appeal; (iii) that the Board was fully apprised of these developments; (iv) that the Government designated the identical contracting officer's decision as forming the basis<sup>4</sup> for its conclusions with respect to both appeals; (v) that the language employed in the Order "seems to suggest that it was important to overturn the parties' freely made stipulation"; and (vi) that the taking of this position after briefs were submitted and the

(Continued)

determination whether certain facts are disputed or undisputed.

"If the Board on the present record is unable or unwilling to make a determination of the legal consequences that attach to the facts as presently developed, we believe the interests of efficiency and economy would be to set the matter down for hearing in Seattle forthwith meanwhile continuing the stay of proceedings in IBCA-1072-7-75."

<sup>4</sup> The rationale for this statement is not apparent from the record before us. It is clear that the Government acting through the Department counsel has never been required to take an official position on the claims involved in IBCA-1072 for the simple reason that neither Complaint nor Answer have been filed.

The Board has no way of knowing, of course, what position may have been taken by the Government in the telephone conversations pertaining to these matters which are referred to in correspondence between counsel that is included in the record; nor is it necessary for the Board to resolve any questions as to the positions the parties may have taken on such occasions. This is because "[t]elephone conversations do not have the formality required for judicial admissions." *Defoe Shipbuilding Company*, ASBCA No. 17095 (Mar. 11, 1974), 74-1 BCA par. 10,537 at 49,907.

Board was fully apprised of the stipulation<sup>5</sup> is a matter of concern.

Because of the importance we ascribe to a number of questions appellant's counsel has raised, we will undertake to review the history of the two appeals before addressing ourselves to the various contentions in the light of rules governing practice before the Board and before the Court of Claims.

At the outset we note that if the issues involved in IBCA-1061<sup>6</sup> had not been framed by the Complaint and Answer filed in the case, they would have been readily susceptible

<sup>5</sup> The terms of the stipulation are contained in several letters exchanged between counsel and correspondence between counsel and the Board, the substance of which is quoted in the text, *infra*.

<sup>6</sup> The Complaint requests the Board to issue an order directing the issuance of a Change Order under Article 3 of the contract in the sum of \$11,577.39. The contract includes the General Provisions of Standard Form 23-A (Oct. 1969 Edition).

With respect to the issues involved in the appeal, appellant's counsel states:

"This case presents an important question concerning the extent to which a successful bidder can rely on specific information furnished by the government in preparing its bid, and also the extent to which the government can avoid liability under the changes clause when items furnished under the contract vary from those indicated by the government prior to bid" (Appellant's Opening Brief dated January 6, 1976, 1).

Under the caption "Summary of Argument," Department counsel states:

"Where specifications of a contract list estimated sizes for intake and discharge valves and require the valve sizes to be varied to fit pumps designed and furnished by the same contractor, a change does not occur under the contract when the Government requires the contractor to furnish valves which fit the pumps designed and furnished by the contractor even though some of the valves actually furnished are slightly larger than the estimated sizes and other valves actually furnished are slightly smaller than the estimated sizes" (Government's Opening Brief dated Jan. 6, 1976, 1).

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to determination from the correspondence between the contractor and the project construction engineer which preceded the issuance of the findings and from the findings itself. With respect to that appeal it was apparent (i) that the parties had reached an impasse at the project construction engineer level;<sup>7</sup> (ii) that the matter had been referred to the contracting officer who was authorized to make final decisions under the Disputes clause; (iii) that the contracting officer had done so;<sup>8</sup> and (iv) that the contractor had been specifically advised of his right of appeal.<sup>9</sup>

All these elements are absent from IBCA-1072.<sup>10</sup> The parties had not reached an impasse with respect to both of the claims involved in the

appeal even at the project construction engineer level;<sup>11</sup> the contract-

changes in the manifold outlet sizes totaling \$7,725.96 (IBCA-1072; Exhibits 10 and 13).

Respecting these two claims the contractor's letter to the Bureau of Apr. 30, 1975, refers to a letter from the Bureau dated Jan. 3, 1975, and comments upon a letter from L. K. Comstock & Company, Inc., dated Apr. 11, 1975, which is said to be enclosed (the Comstock letter of Apr. 11, 1975, is not in the record), after which the letter states:

"To date we have concerned ourselves with only the valve size changes. To this will be added extra charges in manifold outlet sizes due to valve changes. \* \* \*

"The claim from Comstock & Company is \$18,638.40 to which a 5% overhead and 10% profit will be added which will bring the electrical changes to \$21,527.35.

\* \* \* \* \*

"As you are aware, the claim for changes in valves sizes is now pending before the Department of the Interior Board of Contract Appeals.

"We would propose that the Bureau decision on the claim for electrical costs and changes in the manifold outlet abide and be consistent with the final determination of the Board of Contract Appeals or the Court of Claims. That is, if the final decision determines that we are entitled to an equitable adjustment on the valves, the same result would follow on the electrical and manifold outlet claims.

"Likewise, if the final decision is that our claim on the valves is without merit, the same result would follow on the manifolds and electrical costs.

"Please advise if this method of proceeding is agreeable" (IBCA-1072; Exhibit 10).

<sup>11</sup> Responding to the contractor's letter of Apr. 30, 1975 (note: 10, *supra*), the project construction engineer states:

"Your proposal that the decision of the Board of Contract Appeals regarding your claim for increased costs due to changes in valve sizes be applied to your claims for increased costs of electrical equipment and changes in the manifold outlet sizes is not acceptable. Since you chose to submit your claims separately, we must evaluate each claim on its own merits. By letter dated June 27, 1975, we stated our position on your claim for the additional electrical equipment costs. Therefore, upon receipt of detailed information regarding your increased costs for the manifold outlets, we will give that claim consideration." (IBCA-1072; Exhibit 12, letter of July 21, 1975)

<sup>7</sup> The project construction engineer's letter to the contractor under date of May 29, 1974, concludes:

"In view of the above facts, we find no merit in the arguments presented by you in support of your claim and therefore your claim is denied. If you wish to pursue this claim further, you should request that a findings of fact be prepared" (Exhibit 11).

Unless otherwise indicated, all references to exhibits are to those contained in the appeal file for IBCA-1061.

<sup>8</sup> The document from which the appeal was taken is captioned "Findings of Fact and Decision by the Contracting Officer" and is dated Jan. 29, 1975. The stamped signature on the appeal file copy indicates that the findings were signed by H. G. Arthur, Director, Design and Construction (Contracting Officer) (Exhibit 2).

<sup>9</sup> The last paragraph of the findings reads: "14. A copy of this findings of fact is being transmitted to the contractor with attention being invited to the right of appeal within 30 days, as provided in clause No. 6 of the General Provisions of the Contract \* \* \*" (Exhibit 2).

<sup>10</sup> The aggregate amount of the claims involved in the appeal appears to be \$29,253.31 with the claim for electrical changes being in the sum of \$21,527.35 and the claim for

ing officer had issued no decision; and in a memorandum to the Board transmitting a copy of the notice of appeal the contracting officer noted that he had not been requested to rule on the claims involved in the appeal;<sup>12</sup> nor is there any evidence indicating that the project construction engineer considered that he was denying any right asserted by the contractor when he refused to acquiesce in the contractor's request couched in the language of a proposal.<sup>13</sup> The notice of appeal is dated July 25, 1975, and in especially pertinent part reads:

The undersigned contractor appeals to the Board of Contract Appeals from the decision reflected in the letter dated July 21, 1975<sup>14</sup> \* \* \* declining to resolve in a single proceeding all claims growing out of changes in valve size on this project and also what is identified somewhat ambiguously \* \* \* as a decision on a claim reflected in a letter dated June 27, 1975 \* \* \*

The decision or decisions are erroneous in that they do not grant the full measure of relief to which the contractor is entitled and result in unnecessary delay and expense to both the contractor and the government by requiring separate treatment of issues having common questions of law and of fact.

At the time the second appeal was docketed on July 28, 1975, or within a short time thereafter, the Board would have been warranted in is-

suing an "Order to Show Cause" why the appeal should not be dismissed for want of jurisdiction.<sup>15</sup> The notice of appeal was accompanied, however, by a letter from appellant's counsel dated July 25, 1975,<sup>16</sup> stating:

We enclose herewith the contractor's Notice of Appeal on claims arising out of and relating to the existing pending appeal.

The Notice of Appeal is filed out of an abundance of caution to preclude any contention by the government that the decision described in the Notice of Appeal were final decisions of the contracting officer under Article 6 which must be separately appealed.

As the Board deems appropriate, the instant appeal may be assigned a separate number,<sup>17</sup> held pending a possible agreed means of consolidating the matters described therein or a motion to consolidate<sup>18</sup> will in due course be filed.

<sup>15</sup> " \* \* \* The Board has authority to raise at any time and on its own motion the issue of its jurisdiction to conduct a proceeding and may afford the parties an opportunity to be heard thereon" (43 CFR 4.105).

See also our recent decision in *VTN Colorado, Inc.*, IBCA-1073-8-75 (October 29, 1975), 82 I.D. 527, 75-2 BCA par. 11,542 at 55,088-089:

" \* \* \* In any event, it is clearly the prerogative of the contracting officer to determine in the first instance whether and, if so, to what extent the claims now asserted are meritorious. *Merritt-Chapman & Scott Corp.* (note 7, *supra*), *Divide Construction Co.*, *supra*; *McGraw-Edison Co.*, *supra*; *Of. James C. Gruber*, ASBCA No. 10568 (October 22, 1965), 65-2 BCA par. 5159."

<sup>16</sup> The caption of the letter reads: "Re: Appeal of Armstrong & Armstrong, Inc., IBCA-1061-3-75."

<sup>17</sup> As the document transmitted to the Board bore the title "Notice of Appeal" and purported to be an appeal from what was described as a "decision," a separate docket number was assigned.

<sup>18</sup> The letter appears to reflect some confusion as to the effect of consolidating appeals in board practice. When separate findings are issued on claims presented and separate appeals are taken therefrom, the

<sup>12</sup> " \* \* \* By letter date Apr. 30, 1975, the contractor requested to incorporate into his appeal two related claims for determination by the Board; namely, (1) changes in the manifold outlet sizes and (2) increased electrical costs. The contractor has not requested a final contracting officer's decision on these claims" (Memorandum dated Aug. 6, 1975).

<sup>13</sup> Notes 10 and 11, *supra*.

<sup>14</sup> Note 11, *supra*.

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Shortly after receipt of our docketing notice appellant's counsel submitted a written request<sup>19</sup> that the time for filing the Complaint in IBCA-1072 be "deferred indefinitely" pending an agreement being reached on how to treat the second appeal. Meanwhile, the Board had on Aug. 5, 1975, issued an

appeals are not merged into one another simply because they arose under the same contract. They continue rather to have their separate identities for purposes of pleadings, hearing (if one is held), briefing and decision even if the separate appeals are consolidated.

The practices of the several boards are quite similar and have been from an early date. See, for example, the discussion of the effect of consolidation in *United Contractors*, ASBCA No. 6142 (Feb. 28, 1962), 1962 BCA par. 3314, at 17,061 in which the Armed Services Board stated:

"The question of the scope of jurisdiction over a multi-item claim was again before the Board in *Joule Construction Corporation, Et Al*, ASBCA No. 2730, 2 Aug. 1956, 56-2 BCA par. 1028. The case involved ten separate items of claim under a construction contract which apparently were presented seriatim to the contracting officer. The contracting officer ruled on the claims on various dates and an appeal was taken to the Engineers Board from each decision. Each appeal was taken on a different date. The appeals were consolidated in the Engineers Board which rendered one decision in which each item was discussed separately \* \* \*."

<sup>19</sup> The letter was dated Aug. 5, 1975, and was addressed to the Associate Solicitor, Division of General Law, U.S. Department of the Interior, Washington, D.C. After noting that appellant's counsel expected to be on vacation through approximately mid-September, the letter stated:

"\* \* \* because of the similarity between the issues in this appeal and those in IBCA-1061-3-75, we would appreciate it if the time for the filing of our complaint could be deferred indefinitely pending an agreement to consolidate this appeal with the other or some other agreed means of disposing of the problem."

The letter was transmitted to the Board for necessary action but was not received in the Board's offices in Arlington, Virginia, until Aug. 27, 1975.

"Order Settling Record" with respect to IBCA-1061. The Department counsel responded to the Board's Order by memorandum of Aug. 13, 1975, in which he noted the contents of the contracting officer's memorandum to the Board of Aug. 6, 1975 (note 12, *supra*), and appellant's counsel's request for consolidation of the two appeals<sup>20</sup> after which he stated:

In view of these developments, we request that the Board stay the proceedings in the above-captioned matter until such time as a determination is made to consolidate the appeals or to treat them separately. We also request that the matter not be considered ready for decision until 30 days after a determination is made to either consolidate the appeals or to treat them separately.

Having no knowledge of the request of appellant's counsel contained in his letter of Aug. 5, 1975 (note 19, *supra*), the Board by Order dated Aug. 25, 1975, gave the appellant 15 days from the date of receipt of the Order to respond to the Government's request to stay the proceedings in IBCA-1061, and noted that until the Board had ruled thereon neither party need take any action on the Order Settling the Record dated August 5, 1975. After the issuance of the Order of Aug. 25, 1975, the letter from appellant's counsel (note 19, *supra*), was filed

<sup>20</sup> "In connection with two additional claims, the contractor has not requested a final decision by the Contracting Officer and the second notice of appeal may therefore be premature. In any event, the contractor has requested that the separate appeals be consolidated" (Department counsel's memorandum dated Aug. 13, 1975).

with the Board. The contents of such letter together with the request contained in Department counsel's memorandum of August 13, 1975, *supra*, caused the issuance of Order dated Aug. 27, 1975, in which the Board stated:

In view of the Government's request to stay the proceedings in IBCA-1061-3-75 and the appellant's request to defer the time for filing its complaint in IBCA-1072-7-75 pending future developments, further proceedings before the Board with respect to both of the above-captioned appeals are hereby deferred for a period of 60 days in order to afford the parties an opportunity to reach an accord upon the procedure to be followed with respect to the instant appeals.

By our Order of Oct. 29, 1975, proceedings on both appeals were deferred for an additional period of 45 days in order to provide the parties a further opportunity to accomplish their previously stated objective.

The position taken by counsel as outlined above focused the attention of the Board on the prospect for obtaining an agreement between the parties respecting the manner in which the appeals should be processed including a possible agreement to the effect (i) that the issues in the two appeals involved common questions of law and fact and (ii) that a decision on the earlier appeal would be binding on the parties with respect to the later appeal. In the event such an agreement materialized, it was contemplated that pending a decision the later appeal would be held in a suspense status or dismissed without prejudice upon the motion of either

party or by the Board upon its own motion. The fact that the later appeal was premature<sup>21</sup> was not regarded as an insurmountable barrier to proceeding in the manner indicated.<sup>22</sup>

### *The Stipulation*

The first attempt to formulate the terms of a stipulation to govern the proceedings was appellant's counsel's letter to Department counsel of Nov. 4, 1975,<sup>23</sup> stating:

\* \* \* \* \*

We have now reviewed the matter in detail with the client and believe the following procedures would be appropriate for resolution of the cases.

1. Cross motions for summary judgment on entitlement issues in IBCA-1061-3-75.

2. A stay of all action on the claims embraced by IBCA-1072-7-75 pending final determination of 1061-3-75.

There appear to be little or no areas of factual dispute. Such areas of potential factual dispute as do exist are of arguable relevance.

I suppose if the Board deems these of significance, they would rule thusly on the cross motions for summary judgment and then testimony could be taken.

If the above procedure is satisfactory with you, we could agree on dates for submission of supporting briefs to the Board. \* \* \*

<sup>21</sup> The knowledge that both the contracting officer and Department counsel were aware of the precipitate manner in which the appeal in IBCA-1072 had been taken (notes 12 and 20, *supra*) and the failure of the Government to move for dismissal of the appeal on the ground that it was premature, were factors the Board weighed heavily in not raising the jurisdictional question *sua sponte* (note 15, *supra*).

<sup>22</sup> See *Venneri Company v. United States*, 180 Ct. Cl. 920 (1967).

<sup>23</sup> Copies of this letter and of all the ensuing correspondence between counsel quoted from in the text were furnished to the Board.

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The procedure proposed was generally acceptable to Department counsel who furnished further details as to what he considered to be contemplated, however, in his letter to appellant's counsel of Dec. 4, 1975, which stated:

In our last telephone conversation we discussed the possibility of going forward with the above-captioned cases under a procedure agreeable to both of us. In that conversation I suggested several proposed stipulations which we tentatively agreed upon, but we were unable to agree on a major item.

After reviewing the entire matter, I have decided to accept a proposal suggested by you in your letter of November 4, 1975. In essence, your proposal to stay all action on the claims set forth in IBCA-1072-7-75 pending final determination of IBCA-1061-3-75 is acceptable to me.

As I recall, we did agree to simultaneously submit our briefs to the Board by Dec. 23, 1975 and have the case decided without a hearing unless so ordered by the Board. We also agreed to exchange, on or before Dec. 23, 1975, any documents which we might submit to the Board to supplement the record. We further agreed that none of our stipulations would impair any rights or remedies our respective clients otherwise have. Finally, we agreed to give each other an opportunity to respond to matters raised in the briefs and to documents submitted to supplement the record. If either of us decides to so respond, we agreed that our response would be mailed by Jan. 23, 1976.

\* \* \* \* \*

Appellant's counsel responded by letter of Dec. 8, 1975, in which he stated:

I recall agreeing with you on a number of stipulations proposed by you in our telephone conversation with only the

right to discuss and resolve with you any ambiguity in language when they reached me in written form.

I recall no disagreement, let alone on a "major item." On the contrary, I find that the substance of what you say is what we discussed and agreed upon. You have however not included your proposed stipulation that the result in 1061-3-75 also dispose of the issues in 1072-7-75.

I remain agreeable to this. If you don't want to go through with it, that is O.K. too but please do not attribute it so [*sic*] some inability on my part to agree on a major item.

If you want to discuss with me what the major item of disagreement is, we would be happy to work it out with you. Otherwise, the more limited stipulation as set forth in your letter of December 4, 1975 is agreeable with us.

By letter under date of Dec. 11, 1975, Department counsel thanked appellant's counsel for his letter of Dec. 8, 1975, and stated: "I agree that we should proceed under the stipulation as set forth in my letter to you dated December 4, 1975."

Meanwhile the Board had written a memorandum<sup>24</sup> to the Department counsel (with a copy to appellant's counsel) to say that the procedure

<sup>24</sup> "While any final determination must necessarily await review and approval of any stipulations agreed upon and determination that the record as supplemented furnishes a sufficient basis for a decision, the proposed manner of proceeding as outlined in your letter of Dec. 4, 1975, is regarded as generally acceptable subject to clarification of some language \* \* \*."

\* \* \* \* \*

"This memorandum has been written in order that the questions raised may be of assistance to the parties in drafting any stipulations pertaining to the instant appeals and to advise the counsel for the parties that the rules generally applicable to stipulations will be adhered to by the Board in any decision rendered with respect thereto" (Board memorandum dated Dec. 8, 1975).

outlined in Department counsel's letter of Dec. 4, 1975, was generally acceptable subject to clarification of what was intended by some of the language employed.

In a letter to the Board under date of Dec. 11, 1975, appellant's counsel addressed himself to the Board's request for clarification of the proposed stipulation by stating:

\* \* \* \* \*

As far as the claimants are concerned:

1. We have stipulated procedure only.
2. We stipulated no facts.
3. The reservation of rights or remedies language makes explicit what is implicit and that is that by entry into these stipulations, we are not waiving Wunderlich Act review or breach of contract action<sup>25</sup> in the Court of Claims should the decision of the Board be adverse to claimants.

4. We remain willing to stipulate that the final determination through the Court

of Claims, if such action need be taken, in 1061-3-75 will bind the result in 1072-7-75 without piecemeal treatment of the two cases. We remain uncertain whether the Government is likewise willing to stipulate this procedure.

Both counsel, it is fair to state, are in agreement that any stipulations made by us are subject to the Board's approval. Both counsel, it may be fair to state, are of the view that such undisputed facts as do exist provide a basis for the Board to rule as a matter of law on the entitlement issue. It is understood however that the Board may view the matter differently after briefs on the issue are submitted.

We trust this has provided the necessary clarification the Board seeks and have no objection to the incorporation of any language herein in the formal stipulations, if any, to be prepared by Department Counsel.

Subsequently, by memorandum dated Dec. 19, 1975, Department counsel advised the Board as follows:

I contacted William B. Moore, attorney for Appellant, by telephone on Dec. 18, 1975. In our conversation we agreed that a stipulation of facts would not be submitted to the Board in connection with the above appeal. In connection with procedural stipulations, we have, as you know, made several. These are set forth in letters between myself and Mr. Moore and copies of these letters have been sent to the Board. We agreed to proceed under the stipulations set forth in the letters with one change. My letter to Mr. Moore dated Dec. 4, 1975 stated that simultaneous briefs and supplements<sup>26</sup> to the record would be submitted to the Board

<sup>25</sup> See *Jefferson Construction Co. v. United States*, 183 Ct. Cl. 720, 725-26 (1968): " \* \* Merely recasting a dispute which has been made subject to adjustment under the contract into breach of contract language and theory does not remove the disputed claim from the administrative determination required by the contract or from the remedies therein provided \* \* \* ."

\* \* \* \* \*

"The finality of relevant findings of fact, supported by sufficient evidence, which are made by an administrative board in disposing of a claim over which it has the power to grant relief, cannot be denuded by a trial *de novo* in this court on a breach claim which is dependent upon the same underlying facts that have been previously determined by the board \* \* \* the interpretation of the contract, which is the essence of this dispute, is indisputably a question of law, and is not precluded by the administrative board's previous interpretation of the contract."

As to the authority of the contracting officer to settle breach of contract claims, see *Cannon Construction Company, Inc. v. United States*, 162 Ct. Cl. 94, 102 (1963); *Pirate's Cove Marina, IBCA-1018-2-74* (Feb. 25, 1975), 75-1 BCA par. 11,109, at 52,866, footnote 15.

<sup>26</sup> The Government's brief was accompanied by Govt. Supplement No. 1 to Appeal File (Bureau letter of Aug. 9, 1973, to Ingersoll-Rand Company in which the company was notified that certain drawings and data received with its letter of July 24, 1973, were not approved) and Govt. Supplement No. 2 to Appeal File (two letters dated Nov. 5, 1973, from the Ingersoll-Rand Company to the Bureau transmitting various drawings

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by Dec. 23, 1975. We have now agreed to extend this date to January 6, 1975 [sic].

The entire substance of the correspondence comprising the stipulation having been set forth above, it is deemed sufficient here to note that what has been correctly characterized as "procedural stipulations"<sup>27</sup> contemplated that the instant appeals would be processed in the following manner: 1. The Board would rule on the cross motions for summary judgment<sup>28</sup> in IBCA-1061-

and data for approval together with the company's comments).

In especially pertinent part the Bureau's letter of Aug. 9, 1973, stated:

"The drawings and data submitted are for an end-suction pump. Specifications Paragraph 141(a) requires that each pumping unit for Manson Plant F-a (as well as all other units at each pumping plant) shall consist of a horizontal single-stage double-suction centrifugal-type pump or a horizontal double-stage centrifugal-type pump either single or double action.

"Please resubmit pump drawings and data which are in compliance with the requirements of specifications Paragraph 141" (Govt. Supplement No. 1 to Appeal File).

<sup>27</sup> Stipulations as to procedure only are generally self-defeating because of the flexibility of our rules. Exceptions include the comparatively rare instances where the parties have agreed to waive any right they might have had to proceed before a board and have stipulated to the particular matter being presented in the first instance to the Court of Claims. *Jefferson Construction Company v. United States*, note 25, *supra*, and cases cited.

<sup>28</sup> Although our rules make no specific provision for summary judgment, they do contemplate that the Board will fashion procedures to cover areas not delineated in the rules. The general authority for so proceeding is stated in Rule 4.100 in the following terms:

\*(b) Emphasis is placed upon the sound administration of the rules in this subtitle in specific cases, because it is impracticable to articulate a rule to fit every possible circumstance which may be encountered. The rules will be interpreted so as to secure a just and inexpensive determination of appeals without unnecessary delay. \* \* \* (43 CFR 4.100(b).)

3-75 unless it were to conclude that the stipulated record failed to provide a sufficient basis for deciding the entitlement question presented. 2. If the Board concluded that the stipulated record was insufficient on which to base a decision, then testimony could be taken. 3. Pending final determination of the issues involved in IBCA-1061, the stay of proceedings in IBCA-1072 would continue. 4. The term "final determination" as used in the stipulation encompassed a decision by the Court of Claims on the claim covered by IBCA-1061 if the Board decision on the entitlement question presented was adverse to the appellant.

The parties failed to agree upon a stipulation to the effect that the result of the "final determination" by the Board or by the Court of Claims, as the case might be, on the claim involved in IBCA-1061 would be binding on the parties with respect to the claims embraced in IBCA-1072.<sup>29</sup>

<sup>29</sup> No stipulation to this effect was included in Department counsel's letter of Dec. 4, 1975 (text *supra*), as was expressly acknowledged in appellant's counsel's letter of Dec. 8, 1975 (text *supra*), in which he states:

"\* \* \* You have however not included your proposed stipulation that the result in 1061-3-75 also dispose of the issues in 1072-7-75.

"I remain agreeable to this. If you don't want to go through with it, that is O.K. too. \* \* \*

"\* \* \* Otherwise, the more limited stipulation as set forth in your letter of December 4, 1975 is agreeable with us."

In his response of Dec. 11, 1975 (text *supra*), the Department counsel stated: "I agree that we should proceed under the stipulation as set forth in my letter to you dated December 4, 1975."

*Cross Motions for Summary  
Judgment*

In the letter of Feb. 5, 1976 (note 3, *supra*), appellant's counsel states that "[i]f however the Board's ruling on the summary judgment<sup>30</sup> now submitted for decision is that there must be a fuller exploration of the surrounding facts and circumstances, the Board's ruling could help both parties pinpoint the initial facts and assess their significance" and that such action "would assure a more efficient hearing and would also materially contribute to the prospects of a settlement without necessity of a hearing." In the circumstances present here (*i.e.*, denial of summary judgment after submission of simultaneous briefs), the Board considers the request to be reasonable. We will therefore undertake to set forth the principal factors which caused the Board to conclude that it should not render a decision in IBCA-1061 on the basis of the present record.

Until the simultaneous brief of the parties dated Jan. 6, 1976, were filed, the Board had not reviewed the record to determine for itself whether it agreed with counsel's assessment that "such undis-

puted facts as do exist provide a basis for the Board to rule as a matter of law on the entitlement issue" and that "[s]uch areas of potential factual dispute as do exist are of arguable relevance." We were prepared to decide the case on the basis of the existing record if, upon review, we concluded (i) that the contract language was in any and all events controlling with respect to the entitlement question presented or (ii) that the documents in the appeal file evidencing the conduct of the parties could be regarded as decisive irrespective of the construction that might properly be placed on the contract language employed when viewed in the abstract.<sup>31</sup> Upon reviewing the stipulated record in the light of the arguments advanced in the briefs of counsel, however, the Board was unable to conclude that either of the noted conditions were present.

One of the areas where there appears to be a genuine dispute as to material facts is highlighted in appellant's brief where at several places<sup>32</sup> the alleged obligation of the Bureau to permit the use of increasers and reducers between the pumps and the valves is discussed. In the course of that discussion appellant's counsel asserts (i) that the pump supplier (Ingersoll-Rand Company) had provided assurances that the use of increasers and

<sup>30</sup> In effect the Board has resorted to the summary judgment procedures even where one party or the other had requested a hearing. Examples include *Desert Sun Engineering Corporation*, IBCA-725-8-68 (Dec. 31, 1968), 75 I.D. 424, 69-1 BCA par. 7431 (Government request for hearing denied where Board found the Government was improperly attempting to collect both actual and liquidated damages) and *Lloyd E. Tull, Inc.*, IBCA-574-6-66 (Feb. 15, 1967), 67-1 BCA par. 6137 (contractor's claim denied without granting the requested hearing where the Board found that there were no material facts in dispute).

<sup>31</sup> See *General Electric Company*, IBCA-451-8-64 (Apr. 13, 1966), 73 I.D. 95, 66-1 BCA par. 5507 (on the record case); *Compec*, IBCA-573-6-66 (Jan. 4, 1968), 75 I.D. 1, 68-1 BCA par. 6776 (hearing case).

<sup>32</sup> Appellant's Brief, 2-3, 6-7, 9.

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reducers would have no detrimental effect on either the pump or the system and (ii) that "[t]he Bureau's professed fear that use of the increasers or reducers would impair the efficiency of the pump or cause erosion of the mortar line pipe which first surfaced in the Contracting Officer's decision is an obviously contrived afterthought to paper over capricious whimsy" (Appellant's Brief, 6). In the findings, however, the contracting officer states that in a telephone conversation the contractor's pump supplier had been told that the use of increasers and reducers between the pumps and the valves would not be acceptable since "the use of valves and piping which are smaller than the suction and the discharge of the pump reduces a pump's performance and increases the erosion of cement-mortar lined piping systems" (Exhibit 2, paragraph 5).

Review of the other appeal file documents discloses that in a telephone conversation on Feb. 5, 1974, the contractor had been advised by Mr. Jerry Smith of Ingersoll-Rand that "their Denver representative, Mr. Paul Weber, had conferred with U.S.B.R. engineers in Denver relative to the problem of reconciling the estimated valve sizes to the actual pump sizes." In the letter of Feb. 12, 1974, by which this information was conveyed to the project construction engineer, the contractor states: "Mr. Smith advised us that the U.S.B.R. engineers will permit no variance in size between the intake valves and the pump in-

takes or between the discharge valves and the pump discharges" (Exhibit 8). Following the February 5 telephone conversation Ingersoll-Rand wrote the contractor under date of Feb. 9, 1974, to say that the use of the increasers and decreasers "will have no detrimental effect on the pumps" or "on the system"<sup>33</sup> after which the company stated: "As you requested, we have contacted the U.S.B.R. and given them our assurance that there would be no detrimental effect by use of increasers and reducers" (Exhibit 7). From the existing record there is no way of establishing the time when the telephone conversation to which the contracting officer refers took place or who were the participants. There are no answers to other questions raised by the correspondence noted. Was the "assurance" given the USBR by Ingersoll-Rand oral or written? By whom and to whom was it extended? When was it given and with what result? At the time the "assurance" was given to the USBR, did the Bureau interpose the objections stated in the contracting officer's findings? If the Bureau did raise such objections,

<sup>33</sup> The entire paragraph from which this language is taken reads:

"We have discussed this with our shop and have their concurrence that it would be perfectly acceptable to use increasers on the inlet of the pumps and decreasers on the discharge of the pumps in order to retain the valve sizes in the specification. This will have no detrimental effect on the pump as there is plenty of suction pressure. It should also have no detrimental effect on the system as the friction losses and pipe velocities were calculated basis [sic] the valve sizes in the specification anyway" (Exhibit 7).

what response, if any, did the representative of Ingersoll-Rand make? If the propriety of the Bureau's action in refusing to permit the contractor to use increasers and reducers between the pumps and the valves is an important element in the appellant's theory of the case, then the answers to the questions posed are indispensable to an informed judgment. They can best be provided in an adversary type hearing where witnesses appear and are subject to cross-examination.

A question raised by the present record is whether or not the Bureau proceeded with reasonable care in preparing the estimated valve sizes included in the invitation. In the letter to the Bureau of Mar. 21, 1974, the contractor states:

The bidders on the valves and the valve systems had no information available to them other than the bidding documents and drawings. They had no knowledge of what company would supply the pumps as we did not know either until a few minutes before the bid opening. As a matter of fact, all of the pump bidders that we had except Ingersoll-Rand<sup>34</sup> withdrew their bids shortly before bid opening time because they could not meet the WR<sup>2</sup>N<sup>2</sup> requirements (Exhibit 10).

Subsequently, in the letter dated May 31, 1974, the contractor states:

<sup>34</sup> In the letter of Feb. 9, 1974, to the Contractor, Ingersoll-Rand states:

"The specification for the pumps did not state what size connections were to be furnished, although it did give 'estimated' valve sizes which were to be sized identical to the pump connections. The majority of our pumps have connections larger than those of the estimated valve sizes. Use of these large pumps is necessary for us to meet the USBR's speed and efficiency specifications. There is no way we can supply smaller connections and still meet these requirements" (Exhibit 7).

\*\*\* the specifications are, for all practical purposes, closed specifications since only one pump supplier and one motor supplier thought they could fulfill the requirements. These were Ingersoll-Rand and General Electric respectively (Exhibit 12).

The questions suggested by the above quotations and that set forth in note 34, *supra*, are: 1. Is it true that Ingersoll-Rand was the only pump supplier which could meet these specifications? 2. Assuming it was true at the time the invitation was issued, did the Bureau then know this to be the case, or was it chargeable with such knowledge? 3. Assuming affirmative answers to the preceding questions, was the Bureau chargeable with knowledge that in order to meet the "USBR's speed and efficiency specifications" Ingersoll-Rand would have to use large pumps and connections of commensurate size (note 34, *supra*) and therefore required to estimate the various sizes of the valves to be used with the Ingersoll-Rand pump with a greater degree of accuracy<sup>35</sup> than was actually achieved.

Another question raised by the record but apparently related pri-

<sup>35</sup> Cf. *Womack v. United States*, 182 Ct. Cl. 399 (1968) in which in the course of construing the application of a 25 percent variance in quantity clause to the estimated quantity of index cards in an invitation, the Court stated at page 410:

"While the evidence supports the defendant's claim as to the extent of its actual knowledge and its timely disclosure of that knowledge to the plaintiffs, it also shows that an exercise of reasonable care would have alerted it, at least by the time of award of the contract, to the substantial incorrectness of its unquestionably honest but equally erroneous impressions concerning the highly relevant matter of card quantity."

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marily to quantum<sup>36</sup> concerns the extent to which the claims asserted were the result of the substantial delay by Ingersoll-Rand in securing approval of its drawings and other data for the pumps. In the findings the contracting officer notes (i) that the specifications necessitate receipt and approval of pump data prior to approval of the associated valve sizes; (ii) that paragraph 139 (Drawings and Data to be Furnished by the Contractor) requires the contractor to furnish the pump design approval data for all pumping units within 45 calendar days after the date of receipt of notice to proceed; (iii) that the first submittal of pump data was not approved;<sup>37</sup> (iv) that the second submission of pump data for only one pump was received by the Bureau 149 days after the date of receipt of notice to proceed; and (v) that the late receipt of pump data from the contractor's pump supplier placed the contractor's valve suppliers in a period of higher material costs (Exhibit 2, paragraph 11).<sup>38</sup>

The letter from the contractor to the Bureau under date of May 31,

1974, indicates that at least part of the delay in the submission of acceptable pump data may have resulted from the pump supplier undertaking to propose design changes which would have resulted in considerable cost savings to the Government. The proposed design changes were not accepted by the Bureau, however, because they might have had a "domino" effect (*i.e.*, require other changes on the project) (Exhibit 12). Neither the letter in question nor any other document in the record makes clear how much of the delay in obtaining approval of required pump data may have resulted from the pump supplier proposing design changes. Assuming *arguendo* that some part of the delay in obtaining approval of the pump data can be attributed to such cause, a further question arises as to whether the proposed design changes resulted from a purely voluntary effort on the part of the pump supplier or whether such effort went forward at the instigation of the Bureau personnel concerned or with their active collaboration.

The extent to which costs reflected in the claims of the valve suppliers<sup>39</sup> for "valve changes" are at-

<sup>36</sup> We say "apparently related primarily to quantum" since, in the absence of any basis for determining the extent to which the claim may reflect increases in costs due to inflation rather than increased costs due to the "changes" in the valve sizes, we are unable to speak more definitively.

<sup>37</sup> See Bureau's letter dated Aug. 9, 1973 (note 26, *supra*).

<sup>38</sup> Concluding this discussion the contracting officer states in the same paragraph:

"Since the Government is not responsible for the contractor's delay in submitting pump data, I do not believe the Government can be held responsible for any increased costs incurred by the contractor's valve suppliers."

<sup>39</sup> Concerning the claims of one of them the contractor's letter to the Bureau of Feb. 12, 1974, states:

"The Hallgren Company further advises that since approval of their submittals by the U.S.B.R. Denver office on Oct. 1, 1973, fabrication has been progressing so at this date it is nearly ready for shipment. Some of their costs, therefore, probably reflect work that they have done that cannot now be used" (Exhibit 8).

The Hallgren Company was the supplier of the discharge valves and valve operating sys-

(Continued)

tributable to the delay of the pump supplier in submitting acceptable pump data (*i.e.*, to the inflationary spiral) cannot be determined from the present record. In the letter to the Bureau of Feb. 12, 1974, the contractor states:

Both of our suppliers advise that the price of valves has increased a great deal since they bid the job last year. When changes are made either way the valves must be furnished at today's prices instead of the lower prices prevailing last year (Exhibit 8).

After the Bureau responded<sup>40</sup> by noting that the specifications did not provide for increased costs due to price escalation of materials, the contractor expressed regret that its previous letter had given the impression it was making such a request.<sup>41</sup> In its letter to the Bureau of May 31, 1974 (Exhibit 12), the contractor states: "At this time we are not talking about time delays, rather we are talking about the numerous changes in valve sizes requested by the Bureau \* \* \*."<sup>42</sup>

**Continued)**

tems (Exhibit 8). The Bureau's letter to the contractor dated Sept. 27, 1973, contained the statement: "The following valve sizes are satisfactory (provided they are not smaller than the discharge of the pump actually furnished); \* \* \*" (Exhibit 5). (See also Exhibit 9.)

<sup>40</sup> Exhibit 9, letter of Mar. 18, 1974.

<sup>41</sup> "We regret that our previous letter gave the impression that we were requesting payment for increased costs due to price escalation of materials. It was not and is not our intent to make such a request.

"We did make a request for payment for materials that had not been designed at the time of bidding and were not designed until agreement was reached between the U.S.B.R. engineers in Denver and our pump supplier, Ingersoll-Rand" (Exhibit 10).

<sup>42</sup> The letter also states:

"\* \* \* Our supplier, who also relied on the Bureau plans and specifications and did not

The present record indicates that the costs comprising the claims of the valve suppliers are made up of two principal elements, namely: (i) the "numerous changes in valve sizes" and (ii) increases in the costs of the valves attributable to the delay in securing approval of the drawings and other data submitted by the pump supplier.<sup>43</sup> There is no way of knowing, however, the extent to which the costs involved fall into one category or the other. Assuming that both elements are found to be present, the Government could conceivably be found responsible for one or the other category of costs, for both, or for neither. In any event the principles governing the disposition of the portion of the claim involving "numerous changes in valve sizes" are likely to be quite different than those resorted to for determining allowance of the portion of the valve suppliers' claims attributable to the delay in securing approval of the drawings and other

escalate his prices by making allowances for unknown changes, had already placed his order for the valves at his original costs. When he was asked to order different sizes on today's market he refused. He had offered to fulfill his original contract but could not furnish the revised valve sizes at comparable prices. The contractor is then caught between the Government who says we want you to change 39 of the 52 valves we required and the supplier who says he will have to have more money because of shortages and price increases caused largely by Governmental economic policies. \* \* \*" (Exhibit 12).

<sup>43</sup> With respect to the claims submitted by Hallgren Company, a question also exists as to what extent, if any, the claim includes costs incurred for discharge valves before the supplier received notice of the approval of the required drawings and data for the pumps for which the valves were to be furnished (note 39, *supra*).

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data submitted by the pump supplier.

With respect to the first element of the claims, the Board will be concerned primarily with interpreting the terms of the contract taking into consideration the conduct of the parties. As to the second element of the claims, the question would appear to turn on which of the parties is primarily responsible for the substantial delay which occurred in securing approval of the drawings and other data submitted by the pump supplier.

[1] While the answers to the questions posed may be of assistance to the parties in preparing the case for hearing or in achieving a settlement of the matters in controversy, it should be recognized that when the full scale adversary hearing now contemplated is held, some of the questions raised may be of only peripheral (if, of any) importance. The final position of the Board on any of these matters will depend, of course, on the evidence adduced at the hearing. The Board finds that the questions raised and discussed above do show that the presently existing record is an insufficient basis for determining the merits of the entitlement question in IBCA-1061. The cross motions for summary judgment are therefore denied.

*Stay of Proceedings in IBCA-1072*

Throughout the correspondence comprising the stipulation, both counsel have always recognized the right of the Board to conclude that

there were areas of factual disputes or areas of potential factual disputes and therefore deny the cross motions for summary judgment. Adherence to the agreement that the proceedings in IBCA-1072 be stayed pending a "final determination" of IBCA-1061 by the Board or by the Court of Claims, as the case might be, is not seen as dependent upon any ruling by the Board on the cross motions of the parties for summary judgment. There are, however, other and we believe compelling reasons for vacating the stay of proceedings despite the terms of the parties' stipulation.

For the purpose of facilitating the discussion let us quote again the precise language of the stipulation with which we are here concerned. In a letter addressed to appellant's counsel under date of Dec. 4, 1975, the Department counsel stated:

After reviewing the entire matter, I have decided to accept a proposal suggested by you in your letter of Nov. 4, 1975. In essence, your proposal to stay all action on the claims set forth in IBCA-1072-7-75 pending final determination of IBCA-1061-3-75 is acceptable to me.

In a letter addressed to the Board under date of Dec. 11, 1975, appellant's counsel made clear the meaning to be ascribed to the term "final determination," stating:

3. The reservation of rights or remedies language makes explicit what is implicit and that is that by entry into these stipulations, we are not waiving Wunderlich Act review or breach of contract action in the Court of Claims should

the decision of the Board be adverse to claimants.

4. We remain willing to stipulate that the final determination through the Court of Claims, if such action need be taken, in 1061-3-75 will bind the result in 1072-7-75 without piecemeal treatment of the two cases. We remain uncertain whether the Government is likewise willing<sup>44</sup> to stipulate this procedure.

[2] When negotiations between counsel concerning the terms of the stipulation finally concluded, the Board did not view the final product that emerged<sup>45</sup> as a likely vehicle for expediting the resolution of the instant appeals or for promoting efficiency or economy in their resolution. It was loath to disapprove a procedure which both counsel wished to pursue, however, and it was mindful that the parties may have foreseen the possibility or even the probability of developments occurring<sup>46</sup> which were not reflected

in the terms of the stipulation. At the time the Board acquiesced in the stipulation of the parties, it did not then foresee any legal impediments to adhering to the terms agreed upon.

After simultaneous briefs of the parties were received, however, the Board had occasion to consider the terms of the stipulation governing the stay of proceedings in IBCA-1072 in the light of recent and authoritative pronouncements of the Court of Claims with respect to splitting the cause of action under a single and indivisible contract. Addressing itself to this question in *Container Transport International, Inc. v. United States*, 199 Ct. Cl. 713 (1972),<sup>47</sup> the Court stated at pages 717-18:

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<sup>47</sup> Cf. *Everett Plywood Corporation v. United States*, Ct. Cl. No. 743-71 (Feb. 19, 1975), Slip Opinion at 5-7:

"It is recognized that this court's holding in *Electric Boat Co. v. United States*, 81 Ct. Cl. 361 (1935), cert. denied, 297 U.S. 710 (1936), requires a litigant to seek to amend a pending suit to add later accruing claims under a single contract if he is to avoid dismissal of a later suit on the ground he has split his cause of action. However, defendant has cited no authority, and none has been found, to support the proposition that the obligation to amend extends to claims accruing after a trial has been held and after the trial judge's decision has been rendered. While, in an appropriate case, it may, be desirable even under those circumstances for a party to seek to amend, it does not follow that judicial economy, convenience, and fairness to litigants will always be served by imposing such a requirement either on the parties or the court. [Footnote omitted.]

\* \* \* \* \*

"Under the circumstances present in this case, it is concluded that it would be an unwarranted extension of *Electric Boat* to hold that plaintiff's failure to seek to assert the present claims in *Tonga I* bars it from any further relief. Accordingly, the defense based on splitting of the cause of action is denied."

<sup>44</sup> The Government remained unwilling (note 29, *supra*).

<sup>45</sup> The failure of the parties to agree that the "final determination" on entitlement in IBCA-1061 would be binding with respect to IBCA-1072 (note 29, *supra*) had eliminated the principal factor conducive to expedition, efficiency and economy. The failure to so agree also made the stay of proceedings in IBCA-1072 highly questionable since, until the Complaint and the Answer were filed, there were no litigable issues before the Board; and, barring a settlement being reached, such pleadings would have to be filed in any event after a "final determination" in IBCA-1061, irrespective of whether it was made by the Board or by the Court of Claims. The failure of the parties to stipulate to any facts placed the Board in precisely the position it would have been in if the settlement of the record procedure authorized by its rules and initiated by the Order of Aug. 5, 1975, with respect to IBCA-1061 had been brought to fruition.

<sup>46</sup> The Board would not be told what prospect the parties foresaw for settlement depending upon the rationale adopted by the Board or by the Court of Claims in deciding the entitlement question in IBCA-1061.

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The general rule is, of course, that a final decision on the "merits" of a claim bars a subsequent action on that same claim or any part thereof, including issues which were not but could have been raised as part of the claim. \* \* \* A plaintiff who splits his claim (or cause of action) and fails to include his entire demand in his first suit will have, as a result, to give up the part on which he fails to sue the first time. See *Baird v. United States*, 96 U.S. 430, 432 (1877); *Nager Electric Co. v. United States*, 177 Ct. Cl. 234, 246, 368 F. 2d 847, 855-56 (1966).

We have also held that, normally, a single claim (or, as it used to be called, "cause of action") arises out of each single, indivisible contract (see *Nager Electric Co. v. United States*, *supra*, 177 Ct. Cl. at 245-49, 254, 368 F. 2d at 855-57, 861); \* \* \*

The modern trend with respect to the defense of former adjudication is to insist, first, that a plaintiff raise his entire "claim" in one proceeding, and second, to define "claim" to cover all the claimant's rights against the particular defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. In deciding what factual grouping constitute a transaction, and what groupings make a series of connected transactions, the tribunal acts pragmatically, giving weight to such considerations as whether the facts are related in time, space, motivation or the like so as to form a convenient trial unit,<sup>48</sup> and whether

their treatment as a unit conforms to the parties' expectations or business understanding or usage. See *Ashe v. Swenson*, 397 U.S. 436, 454-56 (1970) (concurring opinion); *F. James, Civil Procedure*, Sec. 11.10 (1965); *Vestal, Res Judicata/Claim Preclusion: Judgement for the Claimant*, 62 NW. U.L. Rev. 357, 359-61, 394, 395 (1967).

In a number of readily foreseeable circumstances the Court of Claims rule against splitting the cause of action would be of no practical significance to the processing of the instant appeals. Such would clearly be the case if the Board were to decide one or both of the instant appeals in favor of the appellant. But at least until the complete record has been made, there can be no presumption that one or the other of the parties to an appeal or to a litigation will prevail.

Viewed from the standpoint of what "could happen," it is clearly conceivable that the Board might decide IBCA-1061 in favor of the Government. In this eventuality the contractor would have the right to bring suit in the Court of Claims on the claim covered by IBCA-1061 and thereby secure a "final determination" of the matter. The contractor would be precluded, however, from including the claims embraced in IBCA-1072 in such Court of Claims action by both the terms of the stipulation and by the doctrine of exhaustion of administrative remedies. If the Court of Claims were to rule in favor of the

<sup>48</sup> It is undisputed that the claims in IBCA-1061 and those in IBCA-1072 arose under the same contract. There appears to be no doubt but that the underlying facts for both appeals are related in time and space so as to form a convenient trial unit. As early as Apr. 30, 1975, the contractor was proposing that the final decision of the Board of Contract Appeals or the Court of Claims on the earlier appeal be binding on the claims involved in the later appeal (note 10, *supra*). The notice of appeal in IBCA-1072 protests the action of the project construction engineer in "requiring sepa-

rate treatment of issues having common questions of law and of fact" (text accompanying note 14, *supra*).

contractor in the suit so filed, there is nothing in the stipulation requiring the Government to accept the decision as binding upon the claims involved in IBCA-1072 (note 29, *supra*). At that juncture the stay of proceedings would no longer be in effect and the appellant would be required to file the Complaint. If subsequently the Board ruled in favor of the Government in IBCA-1072 and the contractor wished to pursue the matter further in the Court of Claims, the Government would be in a position to interpose the defense that the contractor had split the cause of action under a single and indivisible contract. Precisely the same defense could be raised if the Court of Claims sustained the Board's denial of the claims covered by IBCA-1061 and subsequently the contractor brought suit in the Court on the claims embraced in IBCA-1072. Based upon the foregoing analysis, we find that the portions of the stipulation providing for a stay of proceedings in IBCA-1072 pending a "final determination" in IBCA-1061 would require the contractor in some circumstances to pursue a course of action in the Court of Claims in conflict with the requirement of the Court that all claims under a single and indivisible contract be included in the same suit. We further find that to the extent the situations previously outlined came to pass, the terms of the stipulation (requiring a stay of proceeding in one appeal pending a final determination of the other), would have prejudiced

the contractor in prosecuting its claims in the Court of Claims.

Having found that adherence to the stipulation would in some circumstances be prejudicial to the contractor, we now turn to the question of what authority, if any, the Board has to set aside "the parties freely made stipulation" in which the Board had acquiesced.<sup>49</sup> At the outset we note that both the Court of Claims and the several boards have stressed the useful purpose served by stipulations<sup>50</sup> and have given effect to them according to their terms.<sup>51</sup> In *John McShain*,

<sup>49</sup> The fact that neither party has sought to be relieved from the terms of the stipulation is not regarded as depriving the Board of authority to act where, as here, it foresees that the stipulation could be prejudicial to the contractor in some circumstances.

<sup>50</sup> See, for example, *Hegeman-Harris & Co., Inc. v. United States*, 194 Ct. Cl. 574, 581 (1971) ("\* \* \* both public and judicial policy look with favor on stipulations designed to simplify and shorten litigation to the benefit of all parties \* \* \*"); *Defoe Shipbuilding Company*, note 4, *supra*, in which the Armed Services Board stated:

"It is our constant practice to receive forms of judicial admissions and to give them effect and we render final decisions based on them in whole or in part. They are recognized in our Rules 13 and 15.

"Judicial admissions can be made at any stage of a litigation, and are a substitute for and dispense with the need to produce evidence (Note, Judicial Admissions, 64 Colum. L. Rev. 1125-26 (1964); McCormick's Handbook, Evidence, sec. 282 at 630 (2d ed. 1972). They have to be clothed with a certain formality which, as the appellant claims, was probably satisfied in this case.")

<sup>51</sup> *Bates v. United States*, 196 Ct. Cl. 362 (1971); *John McShain, Inc. v. United States*, 179 Ct. Cl. 632 (1967); *Bruno New York Industries Corp. v. United States*, 169 Ct. Cl. 999 (1965); and *Garner v. United States*, 161 Ct. Cl. 73 (1963).

See also *Ray D. Bolander Company, Inc., IBCA-331* (Nov. 16, 1965), 72 I.D. 449, 65-2 BCA par. 5224 (reversed on other grounds, 186 Ct. Cl. 398 (1968)), in which the testimony of a Government witness was stricken because the Government had not in-

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*Inc. v. United States*, 179 Ct. Cl. 632, 635 (1967), the Court of Claims described a stipulation as "a judicial admission"<sup>52</sup> binding on the parties making it absent special considerations." Neither the Court of Claims<sup>53</sup> nor the several boards<sup>54</sup> have hesitated, however, to relieve the parties of the burden of their stipulations in well-defined and limited areas.

formed the contractor of its intent to call the witness, as required by a prehearing agreement between the parties.

<sup>52</sup> It is highly doubtful that a stipulation as to "procedure only" would qualify as a "judicial admission." While the decision in *Defoe Shipbuilding* (note 4, *supra*) was predicated on other grounds, it is clear that the ASBCA had grave doubt whether a concession of ultimate liability should be treated as a judicial admission. Our research has failed to disclose any case involving a situation even remotely similar to the question presented here. In these circumstances we have elected to treat the stipulation as to "procedure only" as if it were subject to the exacting standards required to be met in cases clearly involving judicial admissions before the stipulation may be disregarded because of the special considerations shown to be present. See *Kaminer Construction Corporation v. United States*, text, *infra*, and cases cited therein.

<sup>53</sup> *Hegeman-Harris & Co., Inc.*, note 50, *supra* (counsel may not stipulate the law, since this is "a function which, in the context of a judicial proceeding, is the province of judges. \* \* \*"); *The Sac & Fox Tribe et al. v. United States*, 161 Ct. Cl. 189 (1963).

<sup>54</sup> See *C. H. Leavell and Co.*, ENG. BCA 3492 (Oct. 21, 1975), 75-2 BCA par. 11,596 (contractor relieved from stipulation of issues by the parties with the Board noting "\* \* \* in instances where a stipulation is inadvertent, contrary to law, contrary to fact, or made without proper authority, the Board may disregard the stipulation. \* \* \*"); *Defoe Shipbuilding Company*, note 4, *supra* (Government relieved from concession of liability in stated amount in its brief). In the course of the opinion the Board stated at 49,907-908: "There are features here, however, which make it doubtful that this concession was truly a judicial admission. The proper subject of a judicial admission is a fact. \* \* \* The concession made in this case is not of a fact but of ultimate liability. \* \* \*"

In *Kaminer Construction Corporation v. United States*, 203 Ct. Cl. 182 (1973), the Court of Claims found the Engineer Board had properly refused to be bound by a stipulation entered into and approved in an earlier proceeding in the same case. In connection therewith the Court stated at page 197:

In ordinary circumstances and absent special considerations, where a stipulation is entered into before a board and this court is called upon to review the board decision, great weight will be given to the stipulation. [Citations omitted.] In instances where a stipulation is inadvertent, contrary to law, contrary to fact, or made without proper authority, this court may disregard the stipulation. Though stipulations here were entered into by the parties during the first board hearing, subsequent events led the board to conduct a complete de novo hearing on reconsideration. \* \* \* (Footnotes omitted.)

We consider that "special considerations" are present in this case and that the stipulation should therefore be disregarded. Previously we have noted that when the Board acquiesced in the stipulation between the parties, it was then unaware of any legal impediments to giving effect to the terms of the stipulation. In that sense the stipulation can be said to be inadvertent. In any event, we consider that in the circumstances present here, the agreement of the parties for a stay of proceedings in one appeal pending a "final determination" of the entitlement question on another appeal in a case involving claims arising at about the same time and under the same contract resulted in

counsel for the parties' stipulating to the law. As has been demonstrated, the stipulation failed to reflect an awareness of the Court of Claims rule against splitting the cause of action under a single and indivisible contract. In some circumstances the terms of the stipulation as agreed upon could at least present the appellant with serious problems in pursuing its remedy in the Court of Claims, even if the Government ultimately were unsuccessful in interposing a plea in bar based on the splitting of the cause of action defense. For the reasons stated and under the authorities cited, the Board finds that the stipulation should be disregarded in all further proceedings related to the instant appeals. Accordingly, the stay of proceedings with respect to IBCA-1072 is hereby vacated.

The stay of proceedings having been vacated and there being no other reasons for delay, the appellant is hereby directed to promptly file the Complaint<sup>55</sup> in IBCA-1072 and in any event within 30 days from the date of receipt of this decision.

<sup>55</sup> See Government Contracts, McBride and Wachtel, Sec. 6.20[4]—Statement of Complaint ("Anyone contemplating an appeal should be mindful of the fact that it is a fundamental legal right that a defendant in a law suit be apprised of the charges or details of the claim brought against him. This is not a mere technicality, but is of the very essence of justice and fair play. This should be an elementary standard before the appeal board. Consequently, the appellant must state his contentions in such a way that the Government can reply to them and thus establish issues which the board can adjudicate. Errors on the part of the contracting officer must be specifically assigned \* \* \*").

### Consolidation of Appeals

As previously noted the question of consolidation of appeals has been before the several boards of contract appeals on numerous occasions. A succinct statement of the rationale underlying consolidation of appeals is contained in *Basic Construction Co.*, ASBCA Nos. 20510, 20581, 20585 (Nov. 21, 1975), 75-2 BCA par. 11,611. There the appellant opposed consolidation on the principal ground that separate questions of fact and law were bound to arise with respect to the three appeals. Addressing itself to this question, the Board stated:

Perhaps appellant misunderstands the normal effect of consolidation. Consolidated appeals normally continue to be treated as they individually arose, i.e., as independent appeals, each potentially posing different legal and factual issues. The appeals remain separately numbered and filed. When tried and briefed together, their separate identities remain. Examination of witnesses at trial can be accomplished as though three cases followed one another for trial or, to save witnesses' time, can cover all appeals at one time. No special skills are required to keep files, exhibits and transcribed testimony clear as to the particular appeal to which they related.

\* \* \* \* \*

These three appeals involve small claims of the same electrical subcontractor under the same prime contract, with the same attorneys and, presumably some of the same witnesses. \* \* \*

\* \* \* \* \*

Since its inception, it has been routine for this Board, as for its predecessor Boards, to consolidate appeals. \* \* \*

\* \* \* \* \*

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It is true that the rules do not expressly provide for consolidation. However, there are several relevant provisions in the charter and the rules \* \* \*.

\* \* \* \* \*

Moreover, within its sphere the Board has inherent discretion, as does a federal court within its sphere, to order consolidation of appeals in appropriate cases. An express rule is not required.  
\* \* \*

[3] The provisions the decision cites from the charter and the rules of the ASBCA have their counterpart<sup>56</sup> in the charter and the rules of this Board and in many cases the grant of authority is couched in virtually identical language.<sup>57</sup> The ASBCA says it has inherent discretion to order consolidation of appeals in appropriate cases. We have the same discretion and have frequently exercised it in denying<sup>58</sup> or ordering consolidation<sup>59</sup> where such action was proposed or opposed by one of the parties.

<sup>56</sup> See *Cosmo Construction Co.*, IBCA-412 (Feb. 20, 1964), 71 I.D. 61, 1964 BCA par. 4059.

<sup>57</sup> E.g., compare the statement of the broad general authority conferred by our rules (note 28, *supra*), with the language quoted in *Basic Construction*, *supra*, from Section II, Statement of Purpose, of the ASBCA rules.

<sup>58</sup> *American Cement Corporation*, IBCA-496-5-65 (Jan. 6, 1966), 65-2 BCA par. 5303 at 24,935 ("\* \* \* While a request for consolidation of related appeals for the purpose of having one hearing merits serious consideration, the reasons advanced for granting the stay of proceedings in this case are largely, if not entirely, in the realm of conjecture \* \* \*").

<sup>59</sup> *American Cement Corporation*, IBCA-496-5-65 and IBCA-578-7-66 (September 21, 1966), 73 I.D. 266, 66-2 BCA par. 5849, affirmed on reconsideration, 74 I.D. 15, 66-2 BCA par. 6065 (appeals under same contract ordered consolidated for purpose of hearing and decision even though claims embraced within the two appeals were then pending in the Court of Claims).

Turning to the facts of this case, we note that the notice of appeal in IBCA-1072 states there are common questions of law and of fact involved in the two appeals. In ordinary circumstances the presence of common questions of law and of fact in appeals arising under the same contract virtually insures that they will be consolidated for purposes of hearing and decision.<sup>60</sup>

In ordering consolidation in *Basic Construction Co.*, *supra*, the Board noted that the appeals involved claims of the same electrical subcontractor under the same prime contract with the same attorneys and, presumably, some of the same witnesses. All of these factors or their equivalent are present in this case. Since common questions of law and of fact are said to be involved here, however, it is much more likely that the witnesses with respect to the instant appeals will be the same. Accordingly, the appeals in IBCA-1061 and IBCA-1072 are hereby consolidated<sup>61</sup> for purposes of hearing, briefing and decision.

<sup>60</sup> *American Cement Corporation*, note 59, *supra*; Cf. *Doral Construction Co., Inc.*, ASBCA No. 13734 (Dec. 17, 1973) and *Manson, Smith, McMaster, Inc.*, ASBCA No. 14128 (Dec. 17, 1973), 74-1 BCA par. 10,432 (appeals consolidated for purposes of decision where common jurisdictional question presented, even though the appeals involved different contracts and different contractors).

<sup>61</sup> There is no reason to await the filing of the pleadings in IBCA-1072 before ordering the instant appeals to be consolidated, since such action would be warranted in the circumstances present here, even if it were ultimately determined that the appeals do not involve common questions of law and fact. *Basic Construction Co.*, *supra*.

### *Summary*

1. The cross motions for summary judgment in IBCA-1061 are denied.

2. With respect to the stipulation between the parties, the Board has found that the terms thereof have either been satisfied or should be disregarded for the reasons stated in the opinion with the result that the stipulation will not govern the future processing of the instant appeals.

3. The stay of proceedings in IBCA-1072 is vacated and the appellant is directed to file the Complaint therein promptly and in any event within 30 days from the date of receipt of this decision.

4. The appeals in IBCA-1061 and IBCA-1072 are hereby consolidated for purposes of hearing, briefing and decision.

WILLIAM F. MCGRAW,  
*Chief Administrative Judge.*

I CONCUR:

SPENCER T. NISSEN,  
*Administrative Judge.*

### ESTATE OF DEWEY CLEVELAND

5 IBIA 72

*Decided April 15, 1976*

Appeal from a decision denying petition to reopen.

**AFFIRMED.**

1. Indian Probate: Indian Reorganization Act of June 18, 1934: Generally—270.0

The Indian Reorganization Act recognizes two classes of persons who may

take testator's lands by devise, that is, any member of the tribe having jurisdiction over such lands and legal heirs of the testator.

2. Indian Probate: Indian Reorganization Act of June 18, 1934: Construction of Section 4—270.1

The words "or any heirs of such member" found in sec. 4 (25 U.S.C. § 464 (1970)) were early concluded by the Solicitor to mean those who would, in absence of the will, have been entitled to share in the estate.

**APPEARANCES:** C. Richard Neely, Esq., of the Portland Regional Solicitor's Office, for the Superintendent, Western Washington Agency, appellant.

*OPINION BY ADMINISTRATIVE JUDGE WILSON*

### *INTERIOR BOARD OF INDIAN APPEALS*

The above-entitled matter comes before this Board on an appeal taken by the Superintendent of the Western Washington Agency, through his attorney, C. Richard Neely of the Portland Regional Solicitor's Office, from Administrative Law Judge Robert C. Snashall's denial to grant a reopening of the estate herein.

The record indicates an Order Approving Will and Decree of Distribution was issued by the Judge on Mar. 17, 1975. In the said order the Judge found and declared the forth, fifth, sixth, seventh and eighth clauses of the decedent's will of Feb. 19, 1969, devising lands to his grandchildren, Josephine Carrie Penn, Donneen Ivy Penn,

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Stanley Penn, Francine Penn and Frank Penn, of no force and effect since they were neither heirs at law of the testator nor members of the Quinault Tribe as required by section 4 of the Act of June 18, 1934, 48 Stat. 985, 25 U.S.C. § 464 (1970), hereinafter referred to as the Act.

Thereafter, on May 14, 1975, Emily Cleveland Cooper, for herself and as guardian ad litem for the minors, Josephine Carrie Penn, Donneen Ivy Penn, Frank Ross Penn, along with Stanley William Penn and Francine R. Wilkin through their attorneys, Roche and Roche, filed a petition for rehearing. The petitioners alleged that the notices of hearing mailed were inadequate to put them on notice that issues concerning construction of the will of decedent were to be tried and that they were not afforded opportunity to obtain counsel to represent them in the hearing which in effect was a will contest.

The Judge on May 30, 1975, denied the petition for rehearing on the basis that the petitioners had failed to offer documentation and other evidence in support of their contentions or allegations. No appeal was taken by the petitioners from the said denial for rehearing.

On July 28, 1975, a petition to reopen the estate was filed by S. A. Lozar, Superintendent of the Western Washington Agency, pursuant to the provisions of 43 CFR 4.242 (d) alleging error on the part of the Administrative Law Judge in

interpreting sec. 4 of the Act of June 18, 1934, *supra*, so as to preclude the testator's grandchildren from receiving devises under his will involving lands situated on the Quinault Indian Reservation, Washington.

The Judge on Aug. 12, 1975, denied the petition to reopen on past precedent of the Department. The Judge in his denial further stated that he was without authority to rule in contradiction of the established decisions of the Department, citing in support thereof the *Estate of Emma Blowsnake Goodbear Mike a/k/a Emma Walking Priest*, IA-916 (Oct. 26, 1960); *Estate of Rose Josephine LaRose. Wilson Eli*, 2 IBIA 60, 80 I.D. 620 (1973) and the Solicitor's Opinion, 54 I.D. 584 (1934).

Thereafter, on Aug. 25, 1975, the Superintendent of the Western Washington Agency, Bureau of Indian Affairs, through his attorney, C. Richard Neely, Assistant Regional Solicitor, Portland, filed a notice of appeal from the Administrative Law Judge's denial of Aug. 12, 1975.

Appellant as basis for the appeal states:

The Administrative Law Judge erred in voiding those portions of decedent's will which devised trust allotted lands situated on the Quinault Indian Reservation to his grandchildren based upon his interpretation that they were not heirs or eligible devisees under Section 4 of the Indian Reorganization Act of 1934 (now codified 25 U.S.C. § 464).

The appellant along with the notice of appeal filed a memorandum

of authorities in support of the appeal.

As stated in appellant's memorandum, the only issue in the appeal herein is whether Dewey Cleveland's grandchildren come within the meaning of the phrase "any heirs of such member" as used in sec. 4 of the Indian Reorganization Act which in relevant part provides:

\* \* \* and in all instances such lands or interests shall descend or be devised, in accordance with the then existing laws of the State, or federal laws where applicable, in which said lands are located or in which the subject matter of the corporation is located, to any member of such tribe or such corporation or any heirs of such member: \* \* \*.

The term "heirs of such member," was interpreted by the Assistant Secretary of the Interior to mean "heir of the testator," 54 I.D. 584, 585 (1934). The Secretary in regard thereto stated:

I am of the opinion that \* \* \* the testator may devise to his own heirs \* \* \* but that outside the circle of heirs, the testator may devise only to fellow-members of his tribe or corporation.

[1] The Department has since construed 25 U.S.C. § 464 (1970) as limiting testamentary disposition of lands subject to the Act of 1934, *supra*, to (1) a member of the tribe, or (2) an heir of the testator. *Estate of John Moccasin*, IA-1395 (June 30, 1966).

In light of the foregoing decision since the grandchildren are not members of the Quinault Tribe, it is necessary to determine if they fall within the class of "heirs" in order to qualify as eligible devisees under the testator's will.

In order to make that determination we must look to the existing laws of descent and distribution of the state where such lands are situated to ascertain to whom such land descends in the absence of a will since there are no Federal laws of descent and distribution applicable to Indian trust lands.

The Revised Code of Washington, 11.02.005(6) (1965) defines heirs as:

"Heirs" denotes those persons, including the surviving spouse, who are entitled under the statutes of interstate succession to the real and personal property of a decedent on his death intestate.

The foregoing definition is in line with the interpretation given and followed by the Department in its decisions involving sec. 4 of the Act since 1934.

The Board is not unmindful of the term "any heirs" as it appears in sec. 4 of the Act. However, regarding the term, the Secretary on p. 584 of the 1934 opinion in dealing with the question of what persons other than members of the testator's tribe may lawfully be designated as devisees of his restricted property stated:

\* \* \* If "such member" refers to the testator himself, then the class of non-members entitled to receive restricted Indian property will be limited to those who through marriage, descent or adoption have acquired a relationship to the testator sufficient to constitute them *heirs at law*. [*Italic supplied.*]

Moreover, on page 585 of the same opinion the Secretary went on to state:

\* \* \* I am of the opinion \* \* \* that the testator may devise to his own heirs \* \* \*.

In considering the term "or any heirs of such member" the Secretary in referring to the legislative history, p. 586 of the opinion, concludes:

\* \* \* It seems clear that the purpose of these legislative afterthoughts was not to alter fundamentally the intent and scope of the original restriction but rather to provide for the exigencies of a special case that had not been distinctly considered, namely, the case of an Indian testator desiring to divide his estate by will among those who would, in the absence of a will, have been entitled to share in the estate, namely, his own heirs.

On the same page of the opinion the Secretary makes reference to an explanatory statement made to the House of Representatives by the Chairman of the House Committee on Indian Affairs as follows:

\* \* \* It, [Section 4] however, permits the devise of restricted lands to the heirs, whether Indian or not. \* \* \*

It is the contention of the appellant that the term "any heirs" as used in the Act is ambiguous in identifying those persons to whom a living testator may devise land since technically a living person has no heirs but only heirs apparent or presumptive heirs. Accordingly, the appellant argues that the Department in its past interpretation of "any heirs" in limiting or restricting the devise of lands to those persons who would take the land if the Indian died without a will is too narrow and overly restrictive, thus, prohibiting a devise of land to

more remote, presumptive heirs in those instances where there is an intermediate living person more closely related to the testator as a presumptive heir.

The appellant further contends that such prohibition against devising the land to more remote, presumptive heirs is in direct conflict with the expression given in the 1934 opinion of the Secretary permitting the devise of such land to any person who is a natural heir within the testator's "circle of heirs."

In essence, the appellant contends that the term "any heirs" means "presumptive heirs" and that the grandchildren, children of the living daughter of the testator, fall within the meaning of presumptive heirs and, therefore, are eligible to take the lands situated on the Quinault Reservation.

We disagree with the appellant's contention that the grandchildren in the appeal herein fall within the meaning of presumptive heirs as that term is commonly defined.

In the first instance the Secretary in his opinion of 1934 as indicated elsewhere herein used the term "heir at law" as well as in his reference therein to the legislative history where he concluded:

\* \* \* to divide his estate by will among those *who would, in the absence of a will, have been entitled to share in the estate, namely, his own heirs.* [Italics supplied.]

Clearly, the foregoing indicates the term "any heirs" to have a limited meaning, that is, restricting devises of lands subject to the Act

to those persons to whom a decedent's property passes under applicable laws of descent in the absence of a will.

The foregoing interpretation was clearly spelled out in the *Estate of Left Hand or John (Johnson) Left Hand*, 11223-39 (June 17, 1940), wherein the Department held that:

A grandson was not an heir at law of the testator, being the son of a decedent's living son and therefore not qualified under section 4 of the Act of June 18, 1934 (48 Stat. 984).

The Department further held in the same case that the "rights of all parties under the will must be determined as of testator's death."

In the *Estate of Emma Blow-sake Goodbear Mike a/k/a Emma Walking Priest*, *supra*, it was stated:

[2] It is clear from the foregoing quotation [54 I.D. 585-6] that the phrase in [the] section reading "or any heirs of such member" was early concluded by this office to mean those who would, in the absence of a will, have been entitled to share in the estate. \* \* \*

The term "legal heir" was used therein to designate to whom lands could be devised.

Likewise, in the *Estate of John Moccasin*, *supra*, it was held that a legal heir could take as a devisee under sec. 4. The *Estate of Rose Josephine LaRose Eli*, *supra*, held that "as long as the intermediate parent is still living it is undisputed that the grandchild of a decedent cannot be the heir of the decedent under the laws of the state of Montana."

Appellant, in the face of the foregoing decisions, nonetheless urges that the words "any heirs" as used in the Indian Reorganization Act should not be given the alleged narrow and unrealistic meaning heretofore given thereto by the Department and that it be given the ordinary or popular meaning of the word "heir" which would permit presumptive heirs to be named as eligible devisees in an Indian will regardless of their degree of relationship to the testator or the fact that there are living persons more closely related to the testator. Under the foregoing interpretation the appellant contends that Dewey Cleveland's grandchildren are clearly presumptive heirs of the testator and the devise of land to them on the Quinault Reservation is valid notwithstanding the fact their mother survived the testator and who is still living.

An "heir presumptive" is defined as:

The person who, if the ancestor should die immediately, would, in the present circumstances of things, be his heir, but whose right of inheritance may be defeated by the contingency of some nearer heir being born; as a brother or nephew, whose presumptive succession may be destroyed by the birth of a child.

*Black's Law Dictionary*, Revised 4th Edition (1968) citing various case authority; *Ballentine's Law Dictionary*, 3d Edition (1969).

The above definition expresses what we consider the most commonly and widely accepted construction of the term "heirs pre-

sumptive." As has been indicated elsewhere herein, the Department in its decisions, though not using the term "heirs presumptive" the use of the terms "heir at law or legal heir," is in keeping with the definition above stated and with the intent of Congress as expressed in the legislative history of the Act. Any interpretation to the contrary, such as the appellant urges, would be inconsistent with the commonly accepted legal usage of the term.

Accordingly, we find that the grandchildren of Dewey Cleveland in the case at bar do not fall within the meaning of the term "any heirs" of the Act and, therefore, are ineligible to take the lands situated on the Quinault Reservation under the testator's will.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Order Denying Petition to Reopen issued under date of August 12, 1975, by Administrative Law Judge Robert C. Snashall be, and the same is hereby **AFFIRMED**.

This decision is final for the Department.

ALEXANDER H. WILSON,  
*Administrative Judge.*

WE CONCUR:

WM. PHILIP HORTON, *Member of the Board.*

MITCHELL J. SABAGH,  
*Administrative Judge.*

## ITMANN COAL COMPANY

6 IBMA 121

Decided April 15, 1976

Appeal by Itmann Coal Company from an order by Administrative Law Judge George H. Painter in Docket M 75-136 dismissing a petition for modification of the application of 30 CFR 75.1712-2 pursuant to section 301(c) of the Federal Coal Mine Health and Safety Act of 1969.

**Affirmed.**

**Federal Coal Mine Health and Safety Act of 1969: Modification of Application of Mandatory Safety Standards: Generally**

A petition for modification alleging in substance an erroneous interpretation of a mandatory safety standard by MESA does not state a claim upon which relief can be granted under section 301(c) of the Act. 30 U.S.C. § 861(c) (1970).

**APPEARANCES:** Timothy M. Biddle, Esq., for appellant, Itmann Coal Company; Robert L. Long, Esq., Associate Solicitor, Thomas A. Mascolino, Esq., Assistant Solicitor, and Robert A. Cohen, Esq., Trial Attorney, for appellee, Mining Enforcement and Safety Administration; Steven B. Jacobson, for appellee, United Mine Workers of America.

**OPINION BY CHIEF ADMINISTRATIVE JUDGE DOANE**  
**INTERIOR BOARD OF MINE OPERATIONS APPEALS**

Itmann Coal Company (Itmann) appeals from the prehearing dis-

missal in Docket No. M 75-136 of its petition for modification of the application of 30 CFR 75.1712-2 filed under sec. 301(c) of the Federal Coal Mine Health and Safety Act of 1969. 30 U.S.C. § 861(c) (1970). In its petition, Itmann sought relief from a change in interpretation of the subject regulation by the Mount Hope District Manager of the Mining Enforcement and Safety Administration (MESA). Administrative Law Judge Painter dismissed, ruling in substance that allegations adding up to a complaint against an erroneous interpretation of a "mandatory safety standard" do not state a claim upon which relief can be granted under sec. 301(c). On appeal, Itmann challenges Judge Painter's ruling, contending that he misconstrued sec. 301(c). For the reasons set forth below, we are of the opinion that neither an operator nor a representative of miners may contest the validity of MESA's interpretation of a mandatory safety standard in a sec. 301(c) proceeding, and accordingly, we affirm the order of dismissal.

### *Factual and Procedural Background*

The subject of the instant petition for modification is a bathhouse which serves the Itmann Nos. 1, 2 and 3 Mines which are operated near Itmann, West Virginia. The Nos. 1 and 2 Mines each have a single portal, and the bathhouse is located 1.1 miles from the portal of the former and 2.2 miles from the

portal of the latter. The No. 3 Mine has two portals, one of which is 500 feet from the bathhouse while the other is 4.5 miles distant from that point.

By letter dated June 13, 1972, the Bureau of Mines approved the current location of the subject bathhouse. Nearly 3 years later, despite the lack of any material change in circumstances, the Mount Hope District Manager for the Mining Enforcement and Safety Administration rescinded the previous approval in a letter to Itmann dated May 21, 1975.

Subsequently, on May 28, 1975, three notices of violation were issued alleging nonconformance with 30 CFR 75.1712. Itmann applied for review of these notices under sec. 105 of the Act on June 3, 1975. 30 U.S.C. § 815 (1970). HOPE 75-804, 75-805 and 75-806. These applications for review are currently stayed pending the outcome of this appeal.

At all times pertinent to this case, the substantive standard governing bathhouses has been 30 CFR 75.1712-2 which provides:

Bathhouses, change rooms, and sanitary toilet facilities shall be in a location convenient for the use of the miners. Where such facilities are designed to serve more than one mine, they shall be centrally located so as to be as convenient for the use of the miners in all mines served by such facilities.

The above quoted regulation was promulgated by the Secretary in accordance with sec. 301(d) of the Act, 30 U.S.C. § 861(d) (1970), pursuant to discretionary authority to create a safety standard granted

in sec. 317(1), 30 U.S.C. § 877(1) (1970), 30 CFR 75.1712, which states in pertinent part:

*The Secretary may require any operator to provide adequate facilities for the miners to change from the clothes worn underground, to provide for the storing of such clothes from shift to shift, and to provide sanitary and bathing facilities. \* \* \** [Italics added.]

Itmann filed the instant petition for modification on June 10, 1975, contending, with respect to the new interpretation of 30 CFR 75.1712-2 and to the subject mines, " \* \* \* that an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners \* \* \* by such standard \* \* \*." 30 U.S.C. § 861 (c) (1970). The "alternative method" alleged by Itmann was 30 CFR 75.1712-2 as it was interpreted and applied to the subject mines from June 13, 1972, until May 21, 1975.

On June 12, 1975, the United Mine Workers of America (UMWA) filed an answer amounting to a general denial.

Noting that sec. 301(c) by its terms applies only to "mandatory safety standards," MESA moved for dismissal of Itmann's petition on June 24, 1975, on the ground that 30 CFR 75.1712-2 is in substance a mandatory health standard. The UMWA supported MESA's motion on June 30, 1975, and on that same day Itmann filed a statement in opposition. 43 CFR 4.510.

By order dated July 18, 1975, the Judge denied MESA's motion to

dismiss, holding that 30 CFR 75.1712-2 is a mandatory safety standard on the ground that any standard set out in section 302 through sec. 318 is a safety standard.<sup>1</sup> He then dismissed the subject petition sua sponte on the ground that the interpretation of a mandatory safety standard by a District Manager cannot be challenged in a modification proceeding.<sup>2</sup>

Itmann timely noted an appeal to the Board on July 29, 1975. Timely briefs have since been filed by all parties, and the case is now ripe for decision.

<sup>1</sup> Although the propriety of the Judge's ruling is not directly before us, we believe that several observations are appropriate with respect to MESA's argument which was supported by the UMWA. MESA has contended that 30 CFR 75.1712-2 is essentially a mandatory health standard because it " \* \* \* indicates few if any safety considerations \* \* \* " (Br. of MESA, p. 6).

In the first place, MESA has never flatly stated that 30 CFR 75.1712-2 serves no safety purpose at all, an essential predicate to the legal conclusion they would have us draw. Second, if we were to accept the invitation by MESA and the UMWA to declare 30 CFR 75.1712-2 to be a mandatory health standard, questions would inevitably arise as to its enforceability inasmuch as it was developed by the Secretary as a safety standard under sec. 301(d) of the Act, 30 U.S.C. § 861(d) (1970). Compare 30 U.S.C. §§ 811(d), 841 (1970) with *United States v. Finley Coal Company*, 493 F.2d 285 (6th Cir.), cert. denied, 419 U.S. 1089 (1974). Finally, we are well aware of 30 CFR 71.401 which tracks 30 CFR 75.1712-2 almost exactly and was developed and promulgated as a mandatory health standard for surface facilities. We do not view the similarity as a serious problem in and of itself, because a standard can be both a health standard and a safety standard. Compare 30 U.S.C. § 841 (a) with 30 U.S.C. § 878 (1970).

<sup>2</sup> Itmann has not questioned the propriety of the Judge's action in raising this issue sua sponte or dismissing the subject petition without allowing an opportunity to be heard on such issue.

*Issue on Appeal*

Whether the Administrative Law Judge correctly ruled that an allegation of an erroneous interpretation of a mandatory safety standard by a MESA District Manager does not state a claim upon which relief may be granted under sec. 301(c) of the Act.

*Discussion*

By its petition for modification, Itmann sought relief from a change in interpretation of 30 CFR 75.1712-2 by a MESA District Manager with respect to the subject mines, a change which meant that the location of the bathing facility in question was allegedly no longer in compliance. Itmann asked that the original interpretation of 30 CFR 75.1712-2 be substituted for the new interpretation, claiming that the former is, in the words of sec. 301(c), "\*\*\* an alternative method of achieving the result of such standard \*\*\* which will at all times guarantee no less than the same protection afforded by such standard \*\*\*." 30 U.S.C. § 861(c) (1970). Itmann argues that unless we construe sec. 301(c) to cover the subject claim, it will have no available avenue to seek relief and will be denied administrative due process.

Judge Painter was of the view that Itmann could raise an issue as to the correctness of the District Manager's new interpretation, but *not* in a sec. 301(c) proceeding. He acknowledged Itmann's right to administrative due process, but ex-

pressed the opinion that "\*\*\* That issue is to be decided in review proceedings under sec. 105(a) of the Act. \*\*\*" 30 U.S.C. § 815(a) (1970).

On appeal, MESA and the UMWA contend that the Judge's analysis was sound and that his order of dismissal should accordingly be affirmed.

The clause of section 301(c) under which Itmann claims relief reads as follows:

Upon petition by the operator \* \* \*, the Secretary may modify the application of any mandatory safety standard to a mine if the Secretary determines that an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard \* \* \*.

In our opinion, this clause was intended to cover petitions to substitute an alternative safety standard in whole or in part for an existing one having the force and effect of law with respect to an individual mine. The petition here does not involve any such claim; rather, it concerns a request to substitute an alternative *interpretation* of a mandatory safety standard for that currently applied by a MESA District Manager which does not have the force and effect of law.<sup>3</sup> We do not think the Congress contemplated that sec. 301(c) would cover such a claim for relief. To conclude otherwise would turn sec. 301(c) into a review proceeding involving ab-

<sup>3</sup> This kind of statement of policy is not binding on us, and does not have the status of a regulation or a decision of the Board.

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stract claims for declaratory relief where we would be asked to determine the validity of MESA interpretative policy, a policy which does not have the force and effect of law. We would, for example, have to entertain challenges to the validity of changes in the inspector's manual. Sec. 301(c) was not devised for settlement of such theoretical disputes, and we reiterate that it does not provide for a review proceeding. *See In the Matter of: Affinity Mining Company v. MESA*, 6 IBMA 100, 83 I.D. 108, 1975-1976 OSHD par. 20,651 (1976).

In rejecting Itmann's appeal, we are not, as Itmann contends, denying administrative due process by foreclosing litigation of the issue sought to be raised in this proceeding. As MESA and the UMWA have argued, Itmann can challenge the District Manager's interpretation of 30 CFR 75.1712-2 in the course of seeking an administrative remedy from enforcement of such interpretation in the application for review proceedings referred to earlier as having been stayed pending the outcome of this appeal.

### ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), the order of dismissal in the above-captioned docket IS **HEREBY AFFIRMED.**

DAVID DOANE,  
*Chief Administrative Judge.*

I CONCUR:

HOWARD J. SCHELLENBERG, JR.,  
*Administrative Judge.*

**APPEAL OF IVERSEN CONSTRUCTION COMPANY (A/K/A ICONCO)**

**IBCA-981-1-73**

Decided April 19, 1976

Contract No. 14-06-D-7193, Specifications No. DC-6898, Upgrading Section of Malin—Round Mountain 500-kilovolt Transmission Line No. 1, Bureau of Reclamation.

**Denial of Claim Affirmed on Reconsideration.**

**1. Contracts: Construction and Operation: Changes and Extras—Contracts: Disputes and Remedies: Burden of Proof—Contracts: Performance or Default: Acceleration—Rules of Practice: Appeals: Reconsideration**

Where in moving for reconsideration of a decision denying its claim for constructive acceleration, the contractor contended that the Bureau's failure to promptly investigate its claim of delay due to unusually severe weather amounted to a denial of a request for a time extension and that the denial plus other actions of Bureau inspectors constituted an order to complete the work by the specified completion date irrespective of excusable delay and thus was an acceleration order, the Board ruled that a denial of a request for a time extension was insufficient in and of itself to constitute constructive acceleration and reviewing the evidence, affirmed the denial of the claim, holding that the actions of

the inspectors were regarded as suggestions by the contractor and accepted or rejected depending on whether the suggestions were practical or economical.

**APPEARANCES:** Mr. Wade H. Hover, Attorney at Law, San Jose, California, for the appellant; Mr. William A. Perry, Department Counsel, Denver, Colorado, for the Government.

*OPINION BY ADMINISTRATIVE JUDGE NISSEN*

*INTERIOR BOARD OF CONTRACT APPEALS*

Appellant has filed a timely motion for reconsideration of our decision of Dec. 30, 1975, 82 I.D. 646, 76-1 BCA par. 11,644. The motion alleges that the decision is not supported by the findings of fact and is contrary to the applicable law. More specifically, appellant asserts that by focusing on the question of whether Mr. Hart in the Oct. 1 telephone conversation with Mr. Allison ordered, requested or suggested that appellant add more men and equipment to the job in order to complete the work by the scheduled completion date of Nov. 1, 1971, we overlooked the central issue which is whether denial of the time extension to which we found appellant entitled together with the conduct of Bureau personnel constituted a constructive acceleration. Appellant accuses us of viewing the course of conduct of the parties subsequent to Oct. 1 with "tunnel vision" and urges that we vacate our decision and adopt the position of the dissent.

In opposing the motion, Department counsel relies on decisions to the effect that in the absence of newly discovered evidence, motions for reconsideration which merely repeat arguments that were fully considered in the original decision will ordinarily be denied.<sup>1</sup> While this rule might properly be applied here, we conclude that the motion warrants further discussion. The facts are fully set forth in the decision and will be repeated here only insofar as necessary to dispose of the issues raised by the motion.

Appellant's basic position is that the project engineer's failure to act promptly on its letter of Oct. 4 giving notice of delay due to unusually severe weather constituted a denial of a request for a time extension and that the denial plus other actions of Bureau personnel urging that appellant add men and equipment to the job in order to complete the work by the specified completion date of Nov. 1 amounted to a constructive acceleration.

We noted in our decision that the Bureau appeared to have misconceived the nature of its obligation to investigate the delay due to unusually severe weather and to make an appropriate extension of the completion date.<sup>2</sup> We also noted,

<sup>1</sup> Among others, *COAC, Inc.*, IBCA-1004-9-73 (Feb. 19, 1975), 82 I.D. 65, 75-1 BCA par. 11,104.

<sup>2</sup> Information as to weather conditions relied upon as a cause of excusable delay being as readily available to the Government as to the contractor from another Government agency, the contractor ordinarily has no duty to document such weather conditions as a basis for an extension of time. *Paul A. Teegarden*, IBCA-382 (Sept. 27, 1963), 70 I.D.

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however, that appellant appeared to have acquiesced in the Bureau's handling of the matter. This conclusion was based on evidence that although Mr. Allison had examined records of weather conditions occurring at the vicinity of the job prior to the Oct. 1 telephone conversation with Mr. Hart, no effort was made to furnish Hart with the results of that examination in the telephone conversation or in subsequent correspondence during contract performance or immediately following completion of the work, upon the absence of any protest or notice to the Bureau that the failure to act promptly on the notice of delay was causing appellant to incur additional expense and upon the absence of any request by appellant that the job be shut down for the winter. Considering these facts, we further observed " \* \* \* the conclusion appears to be warranted that the contractor's decision to resume work on Oct. 4, 1971, was motivated by the improving weather conditions rather than the actions of the Bureau's representatives." (76-1 BCA at 55,558-559.)

Appellant argues that our acquiescence theory is not supported by the facts, the terms of the contract or the applicable law and that after

the request for a time extension, appellant had no obligation other than to conduct its operation in accordance with the granting or denial of its request by the Government. Even though the Bureau and not appellant had the obligation to obtain the data to either support or rebut the existence of unusually severe weather (note 2, *supra*), the record is clear that Mr. Allison was informed in the Oct. 1 telephone conversation with Mr. Hart that an extension of the completion date depended upon proof that weather conditions experienced by appellant were unusually severe. (76-1 BCA at 55,553.) The final sentence of the project engineer's letter of Oct. 8, 1971, which was written in response to appellant's letter of Oct. 4, 1971, was as follows: "However, determination of unusually severe weather is made by comparison with long-term weather records." We adhere to the view that a reasonable contractor faced with such notice and in possession of information which would support its claim of unusually severe weather would endeavor to make such information available to the Government irrespective of whether the contract imposed such an obligation upon it and that we were warranted in concluding, from appellant's failure to do so and its failure to protest the Bureau's handling of the notice of delay, that appellant was not actively pursuing its claim for a time extension.

436, 437, 1963 BCA par. 3876 at 19,260; *Fermont Division, Dynamics Corporation of America*, ASBCA No. 15806 (Feb. 20, 1975), 75-1 BCA par. 11,139 at 52,999. The contractor's obligation is otherwise where the causes of delay are peculiarly within the contractor's knowledge.

sion. This, as we pointed out, may well have been due to improving weather conditions obviating, in the minds of appellant's officers, the necessity for an extension.

The elaborate data and analyses submitted by appellant's expert witness in support of the claim of unusually severe weather make it obvious that the merits of the claim were not self-evident. Accordingly, even if a prompt investigation of the claim had been undertaken, it is clear that the Bureau would have been entitled to a reasonable time in which to conduct the investigation and that appellant could not reasonably expect that its request would be instantly granted. This, of course, bears on the question of when the Bureau's failure to promptly act on the claim became unreasonable and the equivalent of a denial.

[11 Accepting appellant's contention that the Bureau's failure to promptly act on its notice of delay due to unusually severe weather constituted a denial of its request for a time extension and was so treated by appellant (the latter assertion being dubious indeed), have the elements necessary to ground a successful claim of constructive acceleration been made out? Although we have indicated that a crucial fact is a denial of a time extension because it thereby signals that adherence to the original schedule is required,<sup>3</sup> it is clear that something

more than a denial of a justified request for a time extension is required in order to constitute constructive acceleration.<sup>4</sup> *Continental Consolidated Corporation v. United States*, Ct. Cl. No. 214-69 (Feb. 11, 1972), 17 CCF par. 81,137 (Trial Judge Opinion) adopted by the Court, 200 Ct. Cl. 737 (1972), cited by the dissent and by appellant in support of its motion for reconsideration, is not authority for a contrary conclusion since in that case the contractor had clearly been ordered to accelerate if, in fact, the work was on schedule considering time extensions to which the contractor was entitled. In addition the opinion states, 17 CCF at 86,099: "A contractor under directive to finish by a date earlier than the one to which the contract is ultimately extended has been effectively ordered to accelerate." Since we held that appellant was entitled to an extension of 6 calendar days as a result of the first storm and upon timely

<sup>4</sup> As support for the quoted statement in *Tyee*, note 3 *supra*, we cited *Electronic and Missile Facilities, Inc.*, ASBCA No. 9031 (July 23, 1964), 1964 BCA par. 4338. However, we appear not to have considered the decision on reconsideration of the cited case (Oct. 6, 1964), 1964 BCA par. 4474 at 21,516:

"As emphasized in the Board's original opinion, the order to accelerate did not arise from the Government's failure to grant during performance the time extension to which appellant was entitled, but rather from the Government's requirement that the contractor adhere to the original progress schedule and completion dates after the Government became charged with knowledge that the contractor had experienced excusable delays for which it was claiming the right to a time extension."

See also *Vermont Division, Dynamics Corporation of America*, note 2 *supra*, and cases cited.

<sup>3</sup> *Tyee Construction Company*, IBCA-692-1-68 (June 30, 1969), 76 I.D. 118, 69-1 BCA par. 7748, cited by appellant.

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request would have been entitled to a further extension of 4 days for unusually severe weather in the middle and latter part of Oct., we will briefly review the evidence to ascertain if it would support a finding that appellant was under a directive to complete the work by Nov. 1, 1971.

Appellant relies principally on evidence that upon the resumption of work after the first storm Mr. Bouett, Mr. Chiolero and other Bureau personnel on the work site were very insistent that appellant speed up the work by adding men and equipment to the job.<sup>5</sup> While there is no doubt that statements to the effect that appellant needed more men and equipment on various work operations were made from time to time by Bureau personnel, the record reflects that Messrs. Allison and Jack Iversen had solicited Mr. Chiolero's assistance, stating that they had not previously done any footing work, that during contract performance Mr.

Chiolero's assistance was sought and that Chiolero made suggestions, that these suggestions, including those concerning the addition of men and equipment to the job, were accepted or rejected by appellant's superintendent on the basis of whether the suggestions were considered practical or economical, that appellant's superintendent, Jack Iversen, acknowledged that he had not been directed to speed up the work and that he objected to the use by appellant's counsel of the term "directed" in connection with the employment of additional men and equipment, asserting that he thought its use unfair (footnotes 29 and 30 of opinion and accompanying text). Also noteworthy, is Mr. Iversen's testimony that the work had reached a reasonable and practical stopping point at the time of the snowstorm of Sept. 29 and 30, 1971, and that because a series of jobs had to be done, this was not the case after work resumed on October 4 (footnote 26 and accompanying text). In addition, the record indicates that most of the suggestions upon which appellant relies were made subsequent to Oct. 15 when appellant was committed to finishing the work in any event. Under these circumstances, we are not persuaded that we erred in failing to find that the suggestions of Bureau personnel that men and equipment be added to the job constituted a di-

<sup>5</sup> Appellant appears to have abandoned reliance on the Oct. 1 telephone conversation as a basis for the claim. See pages 1, 4, 5 and 6 of the "Points and Authorities in Support of Motion for Reconsideration." See also page 3 thereof where the following appears: " \* \* \* This refusal to grant appellant's request due to the government's inaction caused appellant to believe that he was required to complete the work by the original completion date despite the unusually severe weather conditions. This reasonable belief was buttressed by the conduct of the government inspectors on the job-site who during the month of Oct. 1971 became increasingly demanding and pressed appellant to ensure completion by Nov. 1, 1971."

rective<sup>6</sup> that the work be completed by Nov. 1.<sup>7</sup>

Appellant placed some emphasis upon other actions of Bureau personnel, *i.e.*, the direction from Mr. Bouett in connection with the resumption of work after the first storm in substance "get on it as soon as you can" which Mr. Chiolero passed on to appellant; the conversation with Mr. Chiolero testified to by Richard Iversen to the effect that if appellant pulled off of the job and the weather remained nice, appellant would face the consequence of the contract being terminated;<sup>8</sup> the controversy over appellant's refusal to proceed with concrete pours; and the conversation

between Mr. Bouett and Mr. Chiolero, overheard by Richard Iversen, wherein Mr. Bouett instructed Chiolero "to get us [appellant] in gear and get more men going and get that job done by the completion date" or Mr. Bouett merely inquired whether appellant was adding men and equipment to speed up the work.<sup>9</sup> However, we find that these actions considered either individually or collectively do not constitute a directive to complete the work by Nov. 1 or otherwise accelerate the work irrespective of excusable delays.

### *Conclusion*

Having reconsidered our decision and finding no error therein, the decision denying appellant's claim of constructive acceleration is affirmed.

SPENCER T. NISSEN,  
*Administrative Judge.*

I CONCUR:

WILLIAM F. MCGRAW,  
*Chief Administrative Judge.*

I dissent and would grant the motion for reconsideration for the reasons set forth in my dissenting opinion of Dec. 30, 1975, 82 I.D. 646, 76-1 BCA par. 11,644.

KARL S. VASIOFF,  
*Administrative Judge.*

<sup>6</sup> *Electrical Enterprises, Inc.*, IBCA-971-8-72 (Mar. 19, 1974), 81 I.D. 114, 74-1 BCA par. 10,528 is clearly distinguishable. In that case written and telephonic instructions from responsible Government officials would, as we held, clearly have constituted acceleration orders under appropriate circumstances. The fatal obstacle to that claim, as appellant recognizes, was the absence of evidence that the work would have been on schedule and completed on time had the contractor's requests for time extensions been granted in a timely fashion.

<sup>7</sup> Although we did not discuss the authority of inspectors on the job to bind the Government assuming the existence of an acceleration order or orders had been proved, we did not mean to imply that such authority had by any means been established. In the absence of a showing of express authority, there must be evidence from which it can at least be inferred that the actions relied upon have been ratified by someone with authority to obligate the Government. See, *e.g.*, *Franklin W. Peters and Associates*, IBCA-762-1-69 (Dec. 28, 1970), 77 I.D. 213, 248 at 224, 71-1 BCA par. 8615 at 40,029. The absence from the record here of the daily reports prepared by Bureau inspectors make any such inference tenuous indeed.

<sup>8</sup> The record reflects that Mr. Allison to whom the conversation with Mr. Chiolero was relayed by Richard Iversen, albeit in a different version, was well aware of Chiolero's lack of authority to terminate the contract (Tr. 93, 94).

<sup>9</sup> Even if Mr. Iversen's version of this conversation is accepted, its significance depends on evidence that Mr. Chiolero carried out the alleged instructions from Mr. Bouett. We note that Chiolero flatly denied ever telling appellant to increase the number of men and equipment on the job (Tr. 383, 384).

*April 21, 1976***ELDON BRINKERHOFF****24 IBLA 324***Decided April 21, 1976*

Appeal from the decision (Utah 110-75-1(SC)) of Administrative Law Judge Robert W. Mesch finding appellant guilty of grazing trespasses, fining him for damages caused, and reducing his active use under his grazing permit by 20 percent for 2 years.

**Affirmed.**

**1. Grazing Permits and Licenses: Generally—Grazing Permits and Licenses: Trespass—Trespass: Generally—Words and Phrases**

The term "grazing trespass" as used in the context of the Federal Range Code refers to the grazing of livestock on federal land without an appropriate license or permit or in violation of the terms and conditions of a license or permit, and not to any other special meaning ascribed under other laws and circumstances if inconsistent with this usage.

**2. Administrative Practice—Administrative Procedure: Generally—Attorneys—Constitutional Law: Due Process—Grazing Permits and Licenses: Generally**

Although a respondent in a grazing license trespass hearing brought by the Bureau of Land Management has the right to be represented and aided by legal counsel, the Department has no duty or responsibility under the Constitution or the Administrative Procedure Act to provide such counsel for him.

**3. Grazing Permits and Licenses: Generally—Grazing Permits and Licenses: Trespass—Trespass: Generally**

Where a permittee was found to have committed repeated grazing trespasses, a fine of twice the commercial rate for foraging such animals was warranted in accordance with the regulations.

**4. Grazing Permits and Licenses: Generally—Grazing Permits and Licenses: Cancellation or Reduction—Grazing Permits and Licenses: Trespass—Trespass: Generally**

Where a grazing trespass is willful, grossly negligent, or repeated, disciplinary action in the form of suspension, reduction, or revocation, or denial of renewal of a grazing license or permit may be warranted. The regulatory factors, together with any mitigating circumstances, should be considered to determine the extent of the reduction or other disciplinary action.

**5. Administrative Procedure: Administrative Law Judges—Rules of Practice: Appeals: Generally**

Upon appeal from a decision of an Administrative Law Judge, the Board of Land Appeals may make all findings of fact and conclusions of law based upon the record just as though it were making the decision in the first instance.

**6. Grazing Permits and Licenses: Trespass—Trespass: Generally**

In determining whether grazing trespasses are "willful," intent sufficient to establish willfulness may be shown by proof of facts which objectively show that the circumstances do not comport with the notion that the trespasser acted in good faith or innocent mistake, or that his conduct was so lacking in reasonableness or responsibility that it became reckless or negligent.

**7. Grazing Permits and Licenses: Generally—Grazing Permits and Licenses: Cancellation or Reduction—Grazing Permits and Licenses: Trespass**

Where the record of a grazing trespass case does not support a finding of mitigating or extenuating circumstances which would warrant changing a 20 percent reduction of a grazing permittee's active use qualifications for two grazing seasons, an Administrative Law Judge's order of such a reduction will be upheld.

**APPEARANCES:** Eldon Brinkerhoff, pro se.

**OPINION BY ADMINISTRATIVE JUDGE THOMPSON**

**INTERIOR BOARD OF LAND APPEALS**

Eldon Brinkerhoff appeals from Administrative Law Judge Robert W. Mesch's decision of June 23, 1975 (Utah 110-75-1(SC)), which reduced appellant's grazing privileges on Federal range by 20 percent for 2 years and assessed damages at \$210, for repeated trespasses committed during the 1973 and 1974 grazing seasons in violation of the Taylor Grazing Act of June 28, 1934, as amended, 43 U.S.C. §§ 315, 315a, and 315b (1970), and implementing regulations, 43 CFR 4112.3-1 (a) and (b).

The record reveals that in 1973 and 1974, the Bureau of Land Management (BLM), found appellant's cattle in an area of the Federal range not authorized for grazing by his license; 4 violations were found

in 1973 with a total of 88 cattle, and 3 violations in 1974, totaling 17 cattle. Furthermore, in 1974, appellant's cattle were found grazing on Federal range without BLM ear tags as required by appellant's license; 13 violations occurred, totaling 119 cattle. In consideration of the Bureau's evidence and appellant's admissions, Judge Mesch found appellant guilty of 20 separate grazing trespasses.

[1] Judge Mesch defined a "grazing trespass" as occurring "when livestock graze on Federal lands without an appropriate license or permit or in violation of the terms and conditions of a license or permit." All regulations pertaining to grazing in grazing districts established pursuant to the Taylor Grazing Act are referred to collectively as the "Federal Range Code." The term "grazing trespass" must be understood in the context of the Federal Range Code, especially those regulations prescribing sanctions by way of reductions in grazing privileges and/or damages for violations of the Code (*see* 43 CFR 9239.3-2 discussed *infra*). The Judge's definition succinctly condenses the import of the regulations and the usage of the term "grazing trespass" thereunder. That term has the meaning stated by the Judge and not any other special meaning which might be ascribed under other laws and circumstances if inconsistent with this usage.

April 21, 1976

[2] Appellant filed his statement of reasons incorporated in his Notice of Appeal on July 24, 1975. Before considering his arguments relating to the sanctions imposed, we shall discuss several preliminary matters concerning the hearing. Appellant specifically contends that the Violation and Hearing Notice sent by the BLM notified him of two hearings, and that he had understood that to mean the Bureau would meet with him the day of the hearing to discuss the problem. Appellant contends further that:

a. I had no one to represent me and they would not let my son speak, so we were not prepared for the court action as it was.

b. Many of the things that were brought out I was not prepared to give a proper statement on.

The Bureau's Violation and Hearing Notice was personally served on the appellant Feb. 6, 1975. That Notice makes no reference, in any form, to two hearings. It stated:

*YOU ARE HEREBY CITED TO APPEAR* before an Administrative Law Judge of the Department of the Interior on Tuesday, Mar. 11, 1975, at 9 a.m., in the Kane County Courthouse, Kanab, Utah, to show cause why your license or base property qualifications should not be reduced, revoked, or renewal thereof denied, and satisfaction of damages made.

As to the contention that appellant had no one to represent him, and that he was unprepared to make proper statements on certain matters, the Administrative Procedure

Act, 5 U.S.C. § 555(b) (1970), provides:

A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. \* \* \*

The testimony concerning this issue is as follows:

JUDGE MESCH: Mr. Brinkerhoff, are you representing yourself?

MR. BRINKERHOFF: Yes.

JUDGE MESCH: You do not have an attorney to represent you?

MR. BRINKERHOFF: No.

JUDGE MESCH: Do you have any question about proceedings?

MR. BRINKERHOFF: Yes. Well, just that I'm not guilty of all these trespasses.

(Tr. 4).

Appellant had more than adequate notice of the hearing and its subject matter. Furthermore, he could have filed for a postponement of the hearing within the time allotted by the regulations, showing good cause and proper diligence, in order to retain counsel and/or prepare for the hearing. 43 CFR 4.452-3 and 4.472(b). The fact that appellant had no attorney at the hearing affords him no greater rights on appeal than if he had had an attorney. Judge Mesch carefully counseled him on his rights to object to evidence, to testify, and, otherwise, conducted the hearing in a very proper manner being mindful that appellant had no attorney. We see no violation of any of ap-

pellant's rights. As this Board has stated:

\* \* \* Due process requirements are satisfied by proper notice and an opportunity for a hearing. *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 338 (1963); *United States v. Sullivan*, 9 IBLA 278 (1973); *United States v. Haas*, A-30654 (February 16, 1967). While appellant has the right to be represented by legal counsel, he has no right to have counsel provided nor is the Department obligated by the Constitution or the statute or otherwise to furnish counsel for a party to an administrative hearing. *Hullom v. Burrows*, 266 F.2d 547 (6th Cir. 1959), cert. denied, 361 U.S. 919 (1959); *United States v. Fenton*, A-30621 (Jan. 9, 1967).

*United States v. Jenkins*, 11 IBLA 18, 22-23 (1973). These principles also apply to proceedings under sec. 3 of the Taylor Grazing Act, 43 U.S.C. § 315b (1970).<sup>1</sup>

[3] We turn now to appellant's other contentions which, basically, consist of statements or explanations of his grazing trespasses. Appellant does not articulate the relief he desires in making this appeal, but the matters he discusses go to the issue of whether mitigating circumstances existed which might justify a sanction less onerous than that ordered by the Judge.

Sanctions which may be imposed upon a holder of grazing privileges who commits grazing trespasses are

<sup>1</sup> In regard to appellant's son, nowhere in the record does it appear that he was representing his father. Furthermore, the record reveals that appellant's son was allowed to speak any time he so requested during the course of the hearing.

a fine for damages and disciplinary action affecting his grazing privileges. Both of these actions are involved in this case, and both pertain to a finding that appellant violated regulations 43 CFR 4112.3-1 (a) and (b), which prohibit:

(a) Grazing livestock upon, allowing livestock to drift and graze on, or driving livestock across the Federal range, including stock driveways, without an appropriate license or permit, regular or free-use, or a crossing permit.

(b) Grazing livestock upon or driving livestock across the Federal range, including stock driveway, in violation of the terms of a license or a permit, either by exceeding the number of livestock permitted, or by allowing livestock to be on the Federal range in an area or at a time different from that designated, or in any other manner.

Damages for grazing trespasses are computed according to 43 CFR 9239.3-2(c)(2), which requires the payment of \$4 per animal unit month (AUM) or twice the commercial rate if such amount is higher, where the trespass is found to be clearly willful, grossly negligent, or repeated.

Judge Mesch found appellant had committed "repeated" trespasses and fined him twice the commercial rate (\$5 times 2, equaled \$10 per AUM). We affirm this finding, for the record reveals that appellant had been charged with six previous trespasses during 1968, 1970, and 1971, with fines ranging from \$4 to \$48.<sup>2</sup> Moreover, the trespasses com-

<sup>2</sup> The record shows these fines were paid and the trespasses are considered closed (Ex. 5).

mitted during the 1973 and 1974 grazing seasons constitute repeated trespasses in and of themselves. Appellant offered no evidence to contradict the Government's case that the commercial rate was \$5 per AUM. Furthermore, nothing he has presented in this case establishes that the findings of the Judge, on the times and places the cattle were in trespass and his finding the trespasses were repeated, are incorrect.

[4] Disciplinary action is provided by the regulations in the form of suspension, reduction, revocation, or denial of renewal of a grazing license or permit when a clearly established violation of the terms or conditions of the license or permit occurs, or for a violation of the Taylor Grazing Act or any of the pertinent provisions of the regulations. 43 CFR 9239.3-2. To warrant disciplinary action, the violation must be willful, grossly negligent or repeated. 43 CFR 9239.3-2 (e) (1). Such action is necessary, for:

[i]n no other way can the Department fulfill its obligation to protect the Federal range and to provide for the orderly use and management of that range. This disciplinary control is entirely apart from the imposition of a fine as punishment for willful violation of the provisions of the act or the rules and regulations prescribed by the Secretary. Were it otherwise, the Secretary would be completely at the mercy of licensees who could violate the terms of their licenses or permits at their pleasure secure in the knowledge that their only punishment would be the imposition of a fine.

*Alton Morrell and Sons*, 72 I.D. 100, 109 (1965).

The BLM had recommended a 25 to 30 percent permanent reduction in the appellant's base property qualifications, which Judge Mesch said was "based upon the respondent's repeated trespasses which have created an extensive and continuing problem for the Bureau of Land Management." The Judge, however, found the proper sanction to be a reduction of appellant's active use qualifications by 20 percent for a period of 2 years. In reaching this determination, he stated:

The respondent offered some excuses or justification for the unauthorized grazing. I see no reason, however, to consider the validity of the assertions made by the respondent and rule on the questions of whether the trespasses were clearly willful or grossly negligent. It is clear that the respondent repeatedly trespassed during both the 1973 and 1974 grazing seasons. In addition, evidence was presented, which the respondent did not dispute, showing that he had a record of six previous grazing trespasses between June 1968 and Oct. 1971. \* \* \*

The major question in this appeal is whether the circumstances mentioned by appellant and the evidence of record supports the Judge's order to reduce appellant's active use qualifications by 20 percent for 2 years. While regulation 43 CFR 9239.3-2(e) (1) permits a reduction for repeated trespasses, the other regulatory factors of willfulness and gross negligence should be considered together with any miti-

gating circumstances to determine the extent of the reduction or other disciplinary action. Some Departmental decisions illustrate the weighing of all these factors in determining what, if any, disciplinary action should be imposed. For example, where a trespass occurred due to conditions or events beyond the control of the grazing licensee or because of extenuating circumstances, this Board has declined to reduce grazing privileges. *State Director for Utah v. Chynoweth Brothers*, 17 IBLA 113 (1974); *Lawrence F. Bradbury*, 2 IBLA 116 (1971).

Where a trespass has only been found to be willful, no reduction has been ordered when the evidence revealed no history of prior trespasses or flagrancy in the charged trespass. *Eldon L. Smith*, A-30944 (Oct. 15, 1968).

Where trespasses have been found to be repeated, but not willful, and prompt remedial action had been taken by the trespasser, only small reductions have been ordered, such as 10 percent for 1 year. *John Gribble*, 4 IBLA 134 (1971); *Edmund and Jessie Walton*, A-31066 (May 27, 1969).

Generally, the Department has limited severe reductions of a licensee's or permittee's grazing privileges to cases involving the following elements: (1) the trespasses were both willful and repeated; (2) they involved fairly large numbers of animals; (3) they occurred over

a fairly long period of time; and (4) they often involved a failure to take prompt remedial action upon notification of the trespass. *United States v. Casey*, 22 IBLA 358, 369, 82 I.D. 546 (1975); see *John E. Walton*, 8 IBLA 237 (1972); *Eldon L. Smith*, 8 IBLA 86 (1972); *Alton Morrell and Sons*, *supra*; *L. W. Roberts*, A-29860 (Apr. 23, 1964); *Clarence S. Miller*, 67 I.D. 145 (1960); *Eugene Miller*, 67 I.D. 116 (1960); *J. Leonard Neal*, 66 I.D. 215 (1959). A severe reduction may be a permanent loss of grazing privileges or a temporary loss of significant privileges for a period of years. The present case reduction falls within the middle to somewhat severe range of reductions imposed in the cases cited.

From our review of the record, we find that appellant's trespasses were more than merely repeated, as Judge Mesch held. Those trespasses also fall within the ambit of the term "willful" as used in the grazing trespass cases.

[5] In making this and additional findings, we point out that on appeal from a decision of an Administrative Law Judge, the Board of Land Appeals has all the powers that the Judge had in making his initial decision. 5 U.S.C. § 557(b) (1970). Therefore, this Board may make all findings of fact and conclusions of law based upon the record just as though it were making the decision in the first instance.

[6] Although "willfulness" is basically a subjective standard of the trespasser's intent, it may be proved by objective facts. Thus, in determining whether grazing trespasses are "willful," intent sufficient to establish willfulness may be shown by evidence which objectively shows that the circumstances did not comport with the notion that the trespasser acted in good faith or innocent mistake, or that his conduct was so lacking in reasonableness or responsibility that it became reckless or negligent. *Lawrence F. Bradbury, supra*; *Clarence S. Miller, supra*.

We find the evidence in this case establishes proof of objective facts sufficient for a finding of willfulness.

The record reveals appellant's trespasses were prolonged, for by his own admissions he was in trespass on more than the 20 days charged in the decision. It is also evident from his testimony and the record that he made no determined effort to prevent his cattle from wandering onto the Federal range where he was not licensed or was in violation of the terms of his lease (Tr. 99, 100).

The Judge found a total of 21 AUM's trespass established by the evidence. This is a large amount of grazing use in relation to appellant's agreed active use under the Swallow Park Allotment Management Plan executed in 1969

(Ex. 3). Moreover, this number is magnified by evidence that his cattle were in trespass throughout the grazing seasons, beyond the specific days charged.

By evidence of signed certified mail receipts, appellant received numerous trespass notices, including those charged trespasses settled in 1968, 1970, and 1971 (Ex. 5), besides the numerous notices he received from the Bureau during the 1973 and 1974 grazing seasons (Ex. 3). Furthermore, the record reveals that upon his payment of the fines in 1968, 1970 and 1971, appellant received notification of the closing of those cases with a warning included that if the trespasses continued disciplinary action would be taken. The last warning received by appellant on Dec. 24, 1971, stated in part:

\* \* \* Our records show a history of 5 separate trespass actions in the last 18 months period and 6 actions since 1968. If it is necessary to take trespass action against you again, you will be cited before a hearing examiner<sup>3</sup> to show cause as to why your Federal grazing privileges should not be cancelled or reduced. (Ex. 5).

[7] In seeking to justify these trespasses, appellant attempts to shift the responsibility for the trespasses from himself to others. Although Judge Mesch stated he need not rule on the validity of Mr.

<sup>3</sup> A change of title of the hearing officer from "Hearing Examiner" to "Administrative Law Judge" was made by order of the Civil Service Commission, 37 FR 16787 (Aug. 19, 1972).

Brinkerhoff's assertions to excuse or justify the trespasses, we find that the record does not establish such mitigating circumstances as would warrant reduction in the penalty imposed by the Judge.

Appellant contends, with respect to the trespasses occurring in 1973 and 1974, where his cattle were found in the wrong pasture, that the BLM had failed to keep promises it made prior to a 1967 grazing agreement. Appellant claims that prior to 1966 and 1967 he had a permit covering 11 months' grazing season for 32 head of cattle. Further, he states, that BLM, wanting to make a division between him and some other licensees, agreed to reseed certain land if the licensees would cut their grazing season from 11 to 8 months and cut 33 head of cattle, leaving 49 head per month. He alleges BLM officials promised to make pastures of the reseeded areas, by fencing (supplying both the materials and labor), and had also promised to pipe water into each pasture. Appellant argues he would never have signed for this "split" had the Bureau not stated those facts and started some work on them. In 1973, appellant's cattle were put onto Mud Point Pasture of the Swallow Park Allotment. He alleges that the Bureau had not fixed the fence as agreed in 1967, neither had they reseeded the pasture as promised, nor had they piped water onto Mud Point. He contends that he made trips out

every weekend and many times during the week, but because of a lack of water on Mud Point and the fence being partially completed and in poor condition, he was unable to keep his cattle in the allotted pasture. Appellant commented that his co-operator, John L. LeFevre, had the same problem during this season.

There is no support in the record for appellant's assertions that BLM failed to keep any fencing, water pipe construction, or reseeding agreements. We cannot accept these unsupported assertions made on appeal. At most, we will consider such assertions as an offer of evidence to be produced if a new hearing were to be ordered. However, we see no justification for ordering a further hearing in this case because appellant had ample opportunity to present evidence, as we discussed, *supra*. Furthermore, there is no indication that further evidence could be produced which would require a different result from that reached by the Judge.

The record reveals that appellant's version of the facts prior to 1966 and of a BLM agreement is very questionable. For example, on June 16, 1969, appellant executed, along with John L. and Leslie LeFevre, an agreement adopting the Swallow Park Allotment Management Plan (Ex. 3). This Plan refers to the contested fence between the Mud Point and Podunk pastures (the pastures in which the cattle

trespassed during this period), specifically showing that 2.75 miles had been completed by Aug. 1, 1958, and that the maintenance responsibility was upon the co-operators, which include appellant. Furthermore, on June 16, 1966, appellant had executed an "adjudication grazing adjustment and allotment division agreement." In both this agreement and the 1969 Plan, appellant agreed that the base property qualifications for each operator were only 822 AUM's. His assertion that prior to 1966 and 1967 he had 82 head of cattle for 11 months would have given him active use of 902 AUM's per grazing season. There is no explanation within the record which satisfies how prior active use could have exceeded the base property qualifications. Concerning appellant's allegation the BLM has not reseeded the pastures, the 1969 Plan indicated there had been a reseeding of 2,326 acres. The forage production increased the allotment's carrying capacity, and thereby increased Mr. Brinkerhoff's active use capacity from 182 AUM's shown in the 1966 Plan to 413 AUM's.

Accordingly, appellant's version of the agreement with the BLM, being unsupported by the record and inconsistent with the Allotment Management Plan executed in 1969, cannot support a finding of mitigating or extenuating circumstances relevant to the degree of disciplinary action taken in regard to his trespasses.

Appellant contends, in regard to the ear tag violations committed in 1974, that these were caused by 18 head of his cattle on forest permit lands bordering the BLM allotment. Apparently, these cattle wandered from the forest lands onto the allotment because there was no fence separating the areas. Appellant alleges he tried to get the Bureau and the Forest Service to build a fence or at least provide the materials, but neither would. Appellant's contention is that, "these cattle were paid on government land but on the wrong agency lands."

Appellant's testimony on this matter is revealing. He was asked:

Q. Did you apply for a permit to build a fence across the land?

A. Well, we just told them years ago that there was four or five of us there that would build a fence across there and they turned us down then.

Q. How many years ago has that been?

A. Oh, seven or eight. There was about five of us in there then \* \* \*.

Q. Would that be prior to the time then, that they adopted the allotment management plan?

A. Yes.

(Tr. 99).

The trespasses with which we are concerned occurred after the allotment management plan was adopted. There is no indication appellant applied to construct a fence or take other corrective actions to prevent the trespasses of the cattle from occurring after that time.

Regardless of the reasons why a fence separating the forest lands

from the Swallow Park Allotment had not been constructed, appellant executed the Allotment Management Plan to use Bureau lands for 49 head of cattle for 8 months. This obviously did not include 18 head under a forest permit concerning different lands. Appellant's conduct was unreasonable, for a responsible user of the Federal range would not have assumed he could continually trespass without violating the written agreement previously executed.

In addition to his contentions concerning BLM, appellant offers a different excuse for one violation. He suggests that the trespass charged on May 25, 1974, was probably caused by someone opening his gates which separate his private land and the Bureau allotment. He asserts in his statement of reasons, that there are four county road gates separating his private lands and the BLM land, and that many times in the past few years he has found those gates opened.

Even assuming these facts concerning the gates and the possibility they could be opened by others, this does not establish that any of appellant's gates had been left open on the particular day in question. *Of. John Gribble, supra* at 137. Thus, appellant must be held responsible for this particular trespass.

Therefore, we reject all of appellant's arguments of mitigating or

extenuating circumstances, and find the 20 percent reduction of appellant's active use for 2 years is warranted, based upon the frequency and extent of the trespasses involved. We see no basis for overturning the Judge's order imposing the reduction.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

JOAN B. THOMPSON,  
*Administrative Judge.*

WE CONCUR:

DOUGLAS E. HENRIQUES,  
*Administrative Judge.*

ANNE POINDEXTER LEWIS,  
*Administrative Judge.*

#### AMERADA HESS CORPORATION

24 IBLA 360

Decided April 27, 1976

Appeal from decision of the Montana State Office, Bureau of Land Management, dismissing protest against the issuance of railroad right-of-way oil and gas lease M 31287(ND).

Reversed.

1. Act of April 24, 1820—Oil and Gas Leases: Rights-of-Way Leases—Railroad Grant Lands—Rights-of-Way: Act of Mar. 3, 1875—Rights-of-Way:

from the Swallow Park Allotment had not been constructed, appellant executed the Allotment Management Plan to use Bureau lands for 49 head of cattle for 8 months. This obviously did not include 18 head under a forest permit concerning different lands. Appellant's conduct was unreasonable, for a responsible user of the Federal range would not have assumed he could continually trespass without violating the written agreement previously executed.

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JOAN B. THOMPSON,  
*Administrative Judge.*

WE CONCUR:

DOUGLAS E. HENRIQUES,  
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ANNE POINDEXTER LEWIS,  
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Reversed.

1. Act of April 24, 1820—Oil and Gas Leases: Rights-of-Way Leases—Railroad Grant Lands—Rights-of-Way: Act of Mar. 3, 1875—Rights-of-Way:

April 27, 1976

### Nature of Interest Granted—Title: Generally

The Secretary of the Interior does not have authority under the Right-of-Way Oil and Gas Leasing Act of May 21, 1930, 30 U.S.C. § 301 *et seq.* (1970), to dispose of deposits of oil and gas underlying a railroad right-of-way granted pursuant to the Act of Mar. 3, 1875, when the lands traversed by the right-of-way were later patented under the Act of Apr. 24, 1820, without any reservation for minerals. In such case, title to the mineral estate was included within the grant to the patentee.

### 2. Oil and Gas Leases: Cancellation—Oil and Gas Leases: Rights-of-Way Leases—Rules of Practice: Protests

It is improper to dismiss a protest against issuance of an oil and gas lease applied for pursuant to the Act of May 21, 1930, 30 U.S.C. § 301 *et seq.* (1970), for lands underlying a railroad right-of-way granted under the Act of Mar. 3, 1875, when the lands traversed by the right-of-way were later patented without a reservation for minerals. In such case title to the mineral estate underlying the right-of-way is no longer held by the United States and, therefore, a lease issued pursuant to the 1930 Act is void and must be canceled.

**APPEARANCES:** John S. Miller, Associate General Counsel, Amerada Hess Corporation, Tulsa, Oklahoma, for appellant.

### OPINION BY ADMINISTRATIVE JUDGE RITVO

### INTERIOR BOARD OF LAND APPEALS

### STATEMENT OF THE CASE

Amerada Hess Corporation has appealed from a decision of the Montana State Office, Bureau of Land Management (BLM), dated Aug. 18, 1975, dismissing its protest against the issuance of oil and gas lease M 31287 (ND), issued pursuant to the Right-of-Way Oil and Gas Leasing Act of May 21, 1930, 30 U.S.C. § 301 *et seq.* (1970), to Edward Mike Davis, d/b/a Tiger Oil Company.<sup>1</sup> The Act permits the Secretary to lease deposits of oil and gas in or under lands embraced in railroad and other rights-of-way "whether the same be a base fee or mere easement \* \* \*." 30 U.S.C. § 301 (1970).

Appellant is the lessee by assignment of a private oil and gas lease in the NE  $\frac{1}{4}$  NE  $\frac{1}{4}$  of sec. 29, T. 57 N., R. 95 W., 5th Prin. Mer., Williams County, North Dakota. This oil and gas lease was issued by the successor-in-interest of the original patentee of the N  $\frac{1}{2}$  NE  $\frac{1}{4}$  of sec. 29, who received his patent from the United States on Feb. 5, 1906, pursuant to the Act of Apr. 24, 1820, 3 Stat. 566.<sup>2</sup> This grant was not subject to any mineral reservation.

On Mar. 25, 1975, Edward Mike Davis, d/b/a Tiger Oil Company (hereinafter lessee), filed a lease application pursuant to the Act of

<sup>1</sup> The lessee was notified of the protest and appeal but did not make an appearance.

<sup>2</sup> This Act was entitled "An Act making further provisions for the sale of the Public Lands \* \* \*," its purpose was to change purchase procedures by eliminating the credit system for buying public lands.

May 21, 1930, for oil and gas deposits underlying the right-of-way of Burlington Northern, Inc., successor-in-interest to the Great Northern Railroad Company, which had received a railroad right-of-way easement pursuant to the Act of Mar. 3, 1875, 43 U.S.C. § 934 *et seq.* (1970). Burlington Northern, Inc., had assigned its right to apply for an oil and gas lease to the lessee. *See* 30 U.S.C. § 303 (1970). The Bureau of Land Management issued the railroad right-of-way oil and gas lease to the lessee, effective July 1, 1975, for lands covering approximately 74 acres in secs. 28, 29, and 30, T. 57 N., R. 95 W., 5th Prin. Mer., Williams County, North Dakota. The lease includes a portion of the right-of-way which traverses lands belonging to appellant's lessor.

On July 28, 1975, appellant filed a notice of protest against the issuance of the federal lease. Appellant urged that insofar as the federal lease attempted to include minerals underlying the railroad right-of-way where it crossed tracts of land which had been conveyed by the United States without mineral reservation, the lease was void. Appellant urged that in those instances the patentee of the lands acquired title to the mineral estate under the railroad right-of-way and the United States no longer had any interest therein which it could dispose of by lease.

In its decision of Aug. 18, 1975, the State Office dismissed appellant's protest stating that the Department still retained authority to lease the oil and gas deposits underlying the railroad right-of-way. For its conclusion, the State Office relied upon *Phillips Petroleum Co.*, 61 I.D. 93 (1953), a copy of which was appended to the State Office decision. The State Office decision read in part:

[The *Phillips* case] contains a discussion of the reason for the enactment of the Act of May 21, 1930, and refers to the 1875 Act as well as others.

The act of May 21, 1930, provides the exclusive authority for the leasing of oil and gas deposits underlying railroad rights-of-way acquired pursuant to the act of Mar. 3, 1875.

Having complied with all requirements \* \* \* [the lessee's] application was accepted and lease M 31287 (ND) issued as a result \* \* \*. For the reasons stated herein, the PROTEST is hereby dismissed, and plea for cancellation of the lease M 31287 (ND) denied.

In its statement of reasons on appeal, appellant reasserts its previous arguments and urges that the State Office's reliance upon the *Phillips* case was misplaced. Appellant maintains that the decision in *Phillips* is correct in a limited context, namely, that the case stands for the proposition that the Act of May 21, 1930, was deemed the sole authority for the issuance of leases for oil and gas deposits underlying railroad rights-of-way *in instances where the United States still retained the mineral estate under the right-of-way.*

April 27, 1976

Appellant argues that the United States has retained title to the mineral estate underlying railroad rights-of-way only in cases of pre-1875 Act rights-of-way, or in a post-1875 Act right-of-way situation where the United States retained ownership of the land crossed by the right-of-way. In the present case appellant urges that the United States conveyed the underlying mineral estate when it issued patents without a mineral reservation for lands traversed by the right-of-way and, therefore, no longer has any mineral interest susceptible to leasing under the 1930 Act. The Board agrees with this position and concludes that the decision of the State Office was erroneous and must be reversed.

### LEGAL ANALYSIS

It appears that neither the Department nor the courts have expressly ruled on a case such as this one. However, the conclusion we reach has been implicitly approved by the cases which deal with matters closely related to the one in issue. The main difficulty which arises in this case results from the confusion and uncertainty which historically evolved respecting the nature of the estate created by the grant of a right-of-way issued pursuant to the General Railroad Right of Way Act of Mar. 3, 1875. This Act is a general statute granting railroads a right-of-way across the public lands. It replaced the earlier prac-

tice of grants to individually named railroad companies which, in addition to receiving a right-of-way grant, also received financial assistance and other public lands along the right-of-way. The Act of 1875 granted neither additional public lands nor direct financial aid. *United States v. Union Pacific R. Co.*, 353 U.S. 112, 120-28 (1957). (dissenting opinion.)

For a number of years the Department construed the 1875 Act as creating an easement which did not sever from the public domain the servient mineral estate.<sup>3</sup> This construction, however, changed following the Supreme Court's decision in *Rio Grande Western Ry. Co. v. Stringham*, 239 U.S. 44 (1915). To comprehend the Department's shift in view, the *Stringham* case must be read in conjunction with the Supreme Court's earlier decision in

<sup>3</sup> Following the passage of the Act of Mar. 3, 1875, the Department promulgated regulations respecting the Act which stated, in part, the following:

"The act of March 3, 1875, is not in the nature of a grant of lands; it does not convey an estate in fee, either in the 'right of way' or the grounds selected for depot purposes. It is a right of use only, the title still remaining in the United States.

\* \* \* \* \*

"All persons settling on public lands to which a railroad right of way has attached, take the same subject to such right of way and must pay for the full area of the subdivision entered, there being no authority to make deductions in such cases." 12 L.D. 423, 428 (1888); 27 L.D. 663, 664 (1898). Thereafter, the Department held in *Grand Canyon Ry. Co. v. Cameron*, 35 L.D. 495, 497 (1907), that the grant acquired under the 1875 Act was a mere "easement" which did not prevent the issuance of a mineral patent for the lands traversed by the grant.

*Northern Pacific Ry. Co. v. Townsend*, 190 U.S. 267 (1903). In *Townsend*, the railroad company had acquired a right-of-way pursuant to the Act of July 2, 1864, 13 Stat. 365. Thereafter, homestead entries were initiated and patents issued which conveyed subdivisions traversed by the right-of-way. The Court stated, *supra* at 270, 271.

At the outset, we premise that, as the grant of the right of way, the filing of the map of definite location, and the construction of the railroad within the quarter section in question preceded the filing of the homestead entries on such section, the land forming the right of way therein was taken out of the category of public lands subject to preemption and sale, and the land department was therefore without authority to convey rights therein. It follows that the homesteaders acquired no interest in the land within the right of way because of the fact that the grant to them was of the full legal subdivisions.

\* \* \* \* \*

\* \* \* In effect the grant [to the railroad] was of a limited fee, made on an implied condition of a reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted. \* \* \* [1]

In the *Stringham* case, the railroad company brought suit to quiet title to land under a right-of-way acquired pursuant to the 1875 Act,

and to which the defendants asserted title under a patent for a placer mining claim. The Court, *supra* at 47, affirmed a judgment quieting title in favor of the railroad company on the basis that,

The right of way granted by this and similar acts is neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee \* \* \* [citing the *Townsend* case.] [2]

In the cases cited above, the United States was not a party to the actions, and its title, or absence thereof, to the mineral estates in dispute was not adjudicated by the Court. The cases, however, set the stage for litigation which developed among the railroads, the United States and third parties respecting title to mineral deposits underlying railroad rights-of-way. Four situations have arisen and they will be considered in order of their res-

<sup>1</sup> Thereafter, in *E. A. Crandall*, 43 L.D. 556 (1915), the Department, relying on *Townsend*, held that a homestead patent granted after the issuance of a right-of-way acquired pursuant to the Act of July 2, 1864, did not convey any interest or estate in lands granted to and possessed by the railroad company on which the homestead entry was initiated.

<sup>2</sup> Thereafter, relying on the *Townsend* and *Stringham* cases, the Department changed its policy with respect to the rights acquired by patentees of land traversed by rights-of-way issued under the 1875 Act. In 46 L.D. 429 (1918), the Department issued *Instructions* stating that homestead entrymen were no longer considered to have any interest in lands covered by 1875 Act rights-of-way. In *Lewis A. Gould*, 51 L.D. 131 (1925), *United States v. Bullington* (On Rehearing), 51 L.D. 604 (1926), and *Otis Birch* (On Rehearing), 53 L.D. 340 (1931), the Department held that mining claims embracing tracts of land traversed by rights-of-way granted under the 1875 Act, carried neither title to the land included within the right-of-way nor any interest in or to any mineral deposits beneath the surface thereof.

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olution by this Department and the courts.

The first conflict arose between the United States and a railroad company as to the title to the oil and gas deposits underlying an 1875 Act right-of-way where the lands traversed by the right-of-way remained in federal ownership. In a Solicitor's Opinion, 56 I.D. 206 (1937), the Department, after first finding that a limited fee and not an easement was granted under the 1875 Act to the railroads, construed the grant as not including within it the right or title to the oil and gas deposits thereunder. This decision was a prelude to the Supreme Court's 1942 decision which effectively overruled the *Stringham* case. In *Great Northern Ry. Co. v. United States*, 315 U.S. 262 (1942), the Supreme Court held that the Act of March 3, 1875, granted an easement only, not limited fee, and conferred no rights in the railroads to the oil and minerals underlying the rights-of-way. The Court, *supra* at 279, stated:

Since the petitioner's right of way is but an easement, it has no right to the underlying oil and minerals. This result does not freeze the oil and minerals in place. Petitioner is free to develop them under a lease executed pursuant to the Act of May 21, 1930, 46 Stat. 373.

Thus, as between the United States and a railroad company holding an easement under the 1875 Act, the title to the mineral estate underlying the right-of-way remained with the United States.

The next dispute to be settled concerned the title to the mineral estate underlying a pre-1875 Act right-of-way. In *United States v. Union Pacific R. Co.*, *supra*, the Supreme Court held that the grant of a right-of-way pursuant to section 2 of the Act of July 1, 1862, 12 Stat. 489, did not convey to the railroad company the title to oil and gas deposits underlying the right-of-way. The Court examined the "limited fee" estate theory propounded in earlier cases and stated that "[t]he most that the 'limited fee' cases decided was that the railroads received all surface rights to the right-of-way and all rights incident to the use for railroad purposes." *Id.* at 119. Therefore, the mineral estate in lands underlying pre-1875 rights-of-way remained in the United States.

Resolution of a third conflict was accomplished in *Union Pacific R. Co.*, 72 I.D. 76 (1965). While the Supreme Court case in *United States v. Union Pacific R. Co.*, *supra*, settled the conflict between the railroad and the United States in favor of the latter over rights to mineral deposits underlying pre-1875 Act rights-of-way, this Departmental case dealt with the issue of whether these rights remain in the United States or pass to subsequent patentees of lands traversed by the right-of-way. The Department held that the *Townsend* case, which was limited to pre-1875 Act grants, was still effective so that

lands covered by "limited fee" rights-of-way were removed from the category of public lands subject to further disposition under the public land laws. Accordingly, it was held that the Department still had authority under the 1930 Act to dispose of oil and gas deposits underlying a pre-1875 Act right-of-way, even though the subject lands traversed by the right-of-way were later granted to Wyoming as school lands. The decision was affirmed, *sub nom. Wyoming v. Udall*, 379 F. 2d 635 (10th Cir.), *cert. denied*, 389 U.S. 985 (1967).

Thereafter, in *George W. Zarak*, 4 IBLA 82 (1971), *aff'd sub nom. Rice v. United States*, 479 F.2d 58 (8th Cir.), *cert. denied*, 414 U.S. 858 (1973), the Board held that the Secretary was authorized under the 1930 Act to dispose of oil and gas deposits underlying a right-of-way granted pursuant to the Act of July 2, 1864, 13 Stat. 367, even though the lands traversed by the right-of-way were later patented under the homestead laws. More recently, in *Brown W. Cannon, Jr.*, 24 IBLA 166, 83 I.D. 80 (1976), the Board held that the minerals underlying a pre-1875 Act right-of-way remained in the United States with respect to lands in alternate sections granted to the railroad company and traversed by the right-of-way as well as for such lands in the even-numbered sections, title to which remained in the United States.

Finally we come to the fourth conflict, which has arisen in this

case, namely, the question of who has title to the mineral estate underlying an 1875 Act right-of-way with respect to lands traversed by the right-of-way which were later patented by the United States without any reservation for minerals.

Appellant points out that the Supreme Court's decision in the *Great Northern* case supports its contention that the mineral estate underlying an 1875 Act right-of-way passes with the patent of land traversed by the right-of-way. The Court, *supra* at 279-80, stated the following:

During the argument before this Court, it was fully developed that the judgment was rendered on the pleadings, in which petitioner denied the allegation of title in the United States, and there was no proof or stipulation that the United States had any title. On this state of the record, the United States was not entitled to any judgment below. However, we permitted the parties to cure this defect by a stipulation showing that the United States has retained title to certain tracts of land over which petitioner's right of way passes, in a limited area, and that petitioner intended to drill for and remove the oil underlying its right of way over each of those tracts. Accordingly, the judgment will be modified and limited to the areas described in the stipulation. [Footnote omitted.]

Appellant argues that the above paragraph clearly indicates that the United States was only entitled to relief respecting lands remaining within federal ownership, and that lands traversed by the right-of-way, but which had been conveyed by the United States without mineral reservation, were no longer subject to

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the jurisdiction of the United States with respect to the oil and gas deposits underlying the right-of-way. We agree with this interpretation of the decision. Furthermore, this conclusion is buttressed by subsequent actions by the Department and the courts.

In the *Phillips* case, *supra*, relied on by the State Office, the appellant had been issued a noncompetitive oil and gas lease pursuant to the Mineral Leasing Act of 1920, for lands covered by a railroad right-of-way granted pursuant to the 1875 Act. The railroad company applied for a lease under the 1930 Act for the oil and gas underlying the right-of-way, and Phillips protested against the action urging that its lease already included the right to exploit the oil and gas under the right-of-way. The Department rejected the argument holding that an oil and gas lease issued under the Mineral Leasing Act of 1920 did not include the oil and gas deposits underlying a right-of-way even though the lease did not expressly except such deposits, and such deposits could only be leased pursuant to the Right-of-Way Oil and Gas Leasing Act of 1930. *See also Charles A. Son*, 53 I.D. 270 (1931). As appellant correctly points out, this case does *not* stand for the proposition that the United States has retained jurisdiction to lease such deposits under the 1930 Act in instances where lands conveyed without mineral reserved by the right-of-way have been

tion. In fact, the *Phillips* case was examined and narrowly construed in a subsequent Solicitor's Opinion, 67 I.D. 225 (1960). Before turning to that decision, an examination of an intervening judicial decision is appropriate.

The case of *Chicago & North Western Ry. Co. v. Continental Oil Co.*, 253 F.2d 468 (10th Cir. 1958), involved a railroad company which had acquired a right-of-way pursuant to the 1875 Act. Continental was the assignee of non-federal oil and gas leases on two 40-acre tracts which were traversed by the right-of-way; one tract had been patented by the United States to the state as part of its university land grant, and the other tract had been patented by the United States into private ownership. The railroad company was attempting to exploit the oil and gas deposits underlying the right-of-way and Continental filed suit to enjoin the railroad company from trespassing on the servient mineral estate. The District Court decreed Continental to be entitled to the oil and gas underlying the right-of-way by virtue of its oil and gas leases, and the Circuit Court affirmed. The Circuit Court held that the railroad had only acquired an easement for railroad purposes and that the fee or servient estate, including the minerals, remained in the United States. Implicit in this statement is the understanding that following the issuance of unqualified patents to the state and the

private party, title to the mineral estate underlying the right-of-way was transferred to the patentees and such rights inured to the benefit of Continental.

In *Solicitor's Opinion*, 67 I.D. 225 (1960), after examining the evolution of the Supreme Court's decisions, the Solicitor held that right-of-way grants authorized by Congress, whether considered "easements" or "limited fees," did not include a grant of the minerals underlying the right-of-way. The Solicitor then held that the Mineral Leasing Act of 1920 was applicable to lands within rights-of-way, except to the extent that the 1920 Act was superseded by special leasing laws, such as the Right-of-Way Oil and Gas Leasing Act of 1930. Accordingly, the *Phillips* decision was confined to the holding that the 1930 Act was the exclusive authority for issuance of leases for oil and gas deposits underlying rights-of-way. Other leasable minerals would remain available under the 1920 Act. The Solicitor then went on to discuss the problems which had arisen as a consequence of the changing status of estates granted under the rights-of-way laws, *id.* at 226, 228:

\* \* \* [I]t is the general rule that right-of-way easements on the public lands do not bar the owner of minerals in the land affected from enjoying them subject to his obligation to support the surface and not to interfere with the use of the right-of-way for the purpose for which it was granted, 2 *Lindley on Mines*, 3d Ed., sec. 530, and cases cited \* \* \*.

As shown by the cases cited in *Lindley on Mines*, sec. 530, *supra*, the Department has long recognized that mining claims may be located over and across easements and, subject to the obligation to support the surface, may take the minerals from beneath it. I find nothing to indicate that the rule as to mining claims has changed, nor anything to show that the Department has ever held that the mineral leasing laws (including the 1930 act) do not apply to "easement" rights-of-way. The difficulties that have arisen have been due to the uncertainty as to what were "easements" and what were "fees." Thus *A. Otis Birch* \* \* \*, 53 I.D. 339, held a mining claimant acquired no title to land or minerals in a March 3, 1875, railroad right-of-way because it constituted a "limited fee," but *Healy River Coal Company*, 48 L.D. 443, called the Alaska Railroad right-of-way an easement and recognized the right of a coal lessee to mine coal under the right-of-way if it did not endanger surface use of the right-of-way. \* \* \*

The quoted language suggests that had the Department, in the *Birch* case, considered the right-of-way issued pursuant to the 1875 Act to be an easement instead of a limited fee, the mineral estate underlying the right-of-way would have been categorized as part of the public domain available for acquisition by the mineral claimant. Similarly, in the present case, the servient mineral estate would have passed with the grant of a patent to appellant's predecessor-in-interest, thus removing the minerals from the jurisdiction of the United States.

Further support for this position is contained in the Department's opinion in *Union Pacific Ry Co.*,

\* \* \* \* \*

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*supra* at 80, where the following caveat was added:

As we have seen, when the limited fee concept reigned unchallenged, the Department and the courts held repeatedly that a subsequent grantee or patentee of such lands took no right whatsoever in the right-of-way. \* \* \*

\* \* \* \* \*

*While this reasoning no longer applies to lands crossed by a right-of-way granted under the 1875 act, supra, and the Department recognizes in such cases that mineral rights go to the subsequent patentee subject to the dominant rights of the railroad right-of-way, the Union Pacific case, supra, did not hold that a pre-1875 right-of-way had no more effect than one granted under the 1875 act. [Italics added.] [']*

In *Wyoming v. Udall*, *supra* at 639-41, the Circuit Court, in sustaining the decision of the Department, described the position of the parties as follows:

Wyoming and Gulf rest their case on the proposition that the location of a railroad right-of-way across a tract of public land of the United States does not separate the servient estate from the public domain with the result that title to the servient estate passes without express mention in a subsequent grant by the United States of the traversed tract. *The United States and Union Pacific concede that this rule applies to post-1871 grants but deny its application to previous grants. [Italics added.] [']*

<sup>6</sup>Footnote 2 of the decision cited *Chicago & Northwestern Ry. Co. v. Continental Oil Co.*, *supra*, as support for this statement.

<sup>7</sup>In *Zarak*, *supra* at 87, the Board cited the *Wyoming v. Udall* case, *supra*, and noted that the Court's conclusion, "supports the Department's holding that a pre-1875 right-of-way is more than an easement; it is an interest suf-

[1, 2] As can be seen from an analysis of the decisions cited above, while the circumstances of this case have not been directly before the Department or the courts, the conclusion is nevertheless clear. The Secretary of the Interior does not have authority under the Act of May 21, 1930, to dispose of deposits of oil and gas underlying a right-of-way granted pursuant to the Act of Mar. 3, 1875, with respect to lands traversed by the right-of-way which were later patented without any reservation for minerals. In such a situation, title to the servient mineral estate passed with the grant of the patent and the United States no longer has any mineral interest to dispose of by lease under the 1930 Act. Thus, in the present case the State Office improperly dismissed appellant's protest since the Department was not empowered to issue an oil and gas lease for the mineral estate underlying Burlington Northern, Inc.'s, right-of-way to the extent that title to such mineral estate had passed out of federal ownership. Accordingly, to that extent, the lease is void and must be canceled. *O. D. Presley*, 21 IBLA 190 (1975).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of

ficient to remove the land it covers from the category of public land available for disposition under the general land laws." The decision thus implied that a contrary result would obtain for an 1875 Act right-of-way.

the Interior, 43 CFR 4.1, the decision below is reversed.

MARTIN RITVO,  
*Administrative Judge.*

WE CONCUR:

EDWARD W. STUEBING,  
*Administrative Judge.*

JOSEPH W. GOSS,  
*Administrative Judge.*

### ZEIGLER COAL COMPANY

6 IBMA 132

Decided April 30, 1976

Appeal by Zeigler Coal Company from a decision dated June 24, 1975, by Administrative Law Judge Paul Merlin upholding the validity of a withdrawal order and denying an Application for Review in Docket No. BARB 75-616.

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Withdrawal Orders: Imminent Danger

Accumulations of loose coal, coal dust, and oil and grease together with sources of potential ignition will support a finding of imminent danger.

APPEARANCES: J. Halbert Woods, Esq., for appellant, Zeigler Coal Company; Thomas A. Mascolino, Assistant Solicitor, and David L. Baskin, Esq., Trial Attorney, for appellee, Mining Enforcement and Safety Administration.

### OPINION BY ADMINISTRATIVE JUDGE SCHELLENBERG

### INTERIOR BOARD OF MINE OPERATIONS APPEALS

On Dec. 26, 1974, Withdrawal Order No. 1 CED was issued in Zeigler Coal Company's (Zeigler) No. 9 Mine in Madisonville, Kentucky. The order was issued pursuant to sec. 104(a) of the Federal Coal Mine Health and Safety Act of 1969 (Act)<sup>1</sup> and cited the following condition:

Violations of Section 75.400, 75.514, and 75.516 were in existence in the belt-conveyor slope and the area of the No. 1 south belt-conveyor header: Accumulations of loose coal and coal dust, including float coal dust, were present for the entire length of the slope, and for a distance of approximately 50 feet in by the No. 1 south belt-conveyor head roller, and accumulations of oil and grease were present beneath the No. 1 south belt-conveyor motor and speed reducer (75.400); Splices in power wires in the area of the No. 1 south belt-conveyor header were not reinsulated at least to the same degree of protection as the remainder of the wires (75.514); Power wires in the area of the No. 1 south belt-conveyor header were not supported on insulators, and were contacting wooden props and bars (75.516). Samples Nos. 1 and 2 were collected to substantiate this violation.<sup>2</sup>

<sup>1</sup> 30 U.S.C. secs. 801-960 (1970).

<sup>2</sup> The mandatory safety standards cited in the order provide as follows:

75.400—"Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

75.514—"All electrical connections or splices in conductors shall be mechanically and

*April 30, 1976*

The order was terminated on Dec. 30, 1974, when the accumulations were cleaned up, the splices properly insulated, and the power wires mounted on insulators.

On Jan. 24, 1975, Ziegler filed an Application for Review of the Order and a hearing was held on Apr. 16, 1975, in Arlington, Virginia.

The record discloses the following: The belt was operating at the time the order was issued, and there were accumulations of loose coal, coal dust, and float coal dust along the entire length of the belt (Tr. 23). The accumulations ranged in depth from  $\frac{1}{16}$  inch to  $2\frac{1}{2}$  feet (Tr. 24), and in the inspector's estimation totaled about 3 tons (Tr. 23). About 60 percent of the area covered by the order was wet (Tr. 25). The belt rollers were running in coal dust and accumulations for a distance of 150 to 200 feet (Tr. 27). The belt framing and belt pans were covered with "more than a film" of dry float coal dust (Tr. 29). Oil and grease accumulations were present beneath the south belt-conveyor header and speed reducer (Tr. 38).

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electrically efficient, and suitable connectors shall be used. All electrical connections or splices in insulated wire shall be reinsulated at least to the same degree of protection as the remainder of the wire."

75.516—"All power wires (except trailing cables on mobile equipment, specially designed cables conducting high-voltage power to underground rectifying equipment or transformers, or bare or insulated ground and return wires) shall be supported on well-insulated insulators and shall not contact combustible material, roof or ribs."

The spliced power wires were re-insulated with tape and carried 32 volts (Tr. 68). They were covered with float coal dust and nailed to wooden posts instead of being hung on mounted insulators (Tr. 43-44). While the inspector considered the wires a possible ignition source (Tr. 44), the operator's safety director felt that the tape with which the splices were wrapped precluded any short circuit or sparks (Tr. 88-89).

Finding the inspector's testimony more persuasive, the Administrative Law Judge (Judge) concluded that the wires did present an ignition source. He concluded further that even in the absence of the hazard presented by the wires an imminent danger of fire and explosion was presented by the accumulations of combustible materials, the source of ignition being the belt rollers running in the accumulations. Accordingly, he denied Ziegler's Application for Review.

#### *Issue Presented*

Whether the conditions cited in the Order of Withdrawal support the conclusion that an imminent danger existed.

#### *Discussion*

Ziegler contends that the conditions cited in the order are not sufficient to support a conclusion that imminent danger existed. While Ziegler stresses that potential arcing or sparking of the power wires was far too remote to be considered

an ignition source for a fire or explosion, it does not dispute the existence of the extensive accumulations of combustible materials or attempt to minimize the source of ignition presented by the belt rollers running in coal and coal dust. Zeigler does, however, charge in its brief that the inspector issued the order because he was reluctant to inspect 7 miles of underground belt lines in less than 5 feet of roof, and not because of an imminent danger situation. Based on our review of the record, we find that this charge as well as Zeigler's assignments of error are without merit. We conclude that the cited conditions along the conveyor belt slope, as amplified by the testimony, support the conclusion that an imminent dan-

ger existed, quite apart from any hazard that may have been presented by the power wires. Accordingly, we hold that Zeigler has failed to establish by a preponderance of the evidence that imminent danger did not exist.

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Judge's decision in the above-captioned case IS **AFFIRMED**.

HOWARD J. SCHELLENBERG, JR.,  
*Administrative Judge.*

I CONCUR:

DAVID DOANE,  
*Chief Administrative Judge.*

May 6, 1976

IN THE MATTER OF OLD BEN  
COAL COMPANY  
(No. 24 MINE)

6 IBMA 138

Decided May 6, 1976

Applications for Review—Appeal  
Nos. IBMA 76-81, IBMA 76-84 and  
IBMA 76-85.

Federal Coal Mine Health and Safety  
Act of 1969: Administrative Proce-  
dure: Reconsideration

Where an initial decision has been is-  
sued and a notice of appeal has been filed  
with the Board of Mine Operations Ap-  
peals, an Administrative Law Judge is  
precluded by 43 CFR 4.582(c) from  
granting a subsequently filed motion for  
reconsideration, there being no jurisdic-  
tion.

APPEARANCES: Thomas A. Mas-  
colino, Esq., Assistant Solicitor, Fred-  
erick W. Monerief, Esq., Trial Attor-  
ney, for appellant, Mining Enforce-  
ment and Safety Administration;  
Edmund J. Moriarty, Esq., for appellee,  
Old Ben Coal Company.

MEMORANDUM OPINION  
AND ORDER

INTERIOR BOARD OF MINE  
OPERATIONS APPEALS

On Apr. 19, 1976, the Mining  
Enforcement and Safety Adminis-  
tration (MESA) filed Notices of  
Appeal in the above-listed cases  
with respect to 3 decisions rendered  
by Administrative Law Judge R.

M. Steiner. Subsequently, on  
Apr. 26, 1976, MESA filed motions  
for reconsideration with the Ad-  
ministrative Law Judge with re-  
spect to all of the subject decisions.

In its Notices of Appeal, MESA  
requested that the Board not deter-  
mine the filing dates for its briefs  
while its motions for reconsidera-  
tion were pending before Judge  
Steiner. MESA's requests consti-  
tute motions under 43 CFR 4.510.

On Apr. 26, 1976, appellee Old  
Ben Coal Company (Old Ben)  
cross moved the Board to deter-  
mine the dates of filing imme-  
diately. Among other things, Old  
Ben advised the Board that it had  
already moved Judge Steiner to  
strike the motions for reconsidera-  
tion before him.

This case is now before the  
Board for rulings on the above-  
described motions addressed to it.  
The pertinent regulations are 43  
CFR 4.582(c) and 4.600.

Sec. 4.582(c) of 43 CFR pro-  
vides:

*The Administrative Law Judge's au-  
thority in each case shall terminate upon  
the filing of an appeal from an initial  
decision or other order dispositive of the  
proceeding or upon the expiration of the  
period within which an appeal to the  
Board may be filed or upon an order of  
the Board directing that the proceeding  
be reviewed by the Board. [Italics  
added.]*

Sec. 4.600 of 43 CFR states the  
following:

*Any party may appeal from an Ad-  
ministrative Law Judge's order or from*

an *initial decision* by filing with the Board a notice of appeal within 20 days after service of the order or initial decision. [Italics added.]

Insofar as motions for reconsideration of initial decisions are concerned, the Board acknowledges that Administrative Law Judges may entertain such motions if timely filed. 43 CFR 4.582(c), 4.594. However, the filing of such a motion does not by itself stay the time for filing a notice of appeal. *Compare* 43 CFR 4.600 *with* 43 CFR 4.582(c). Furthermore, sec. 4.582(c) of 43 CFR, which is quoted above, makes clear in no uncertain terms, admitting of no exceptions, that a Judge's authority to entertain such a motion on the merits terminates upon the filing of a notice of appeal with the Board.

Applying the foregoing principles to these cases, the Board is of the view that Judge Steiner's authority to rule on the merits of any motions for reconsideration terminated on April 19, 1976 when the notices of appeal were filed. It follows necessarily that the motions for reconsideration, filed some 7 days *later*, were untimely and that Judge Steiner is limited to denying such motions on the ground of lack of jurisdiction.

*Jones & Laughlin Steel Corporation*, 5 IBMA 1 (1975), upon which MESA relies, is not to the contrary. There, unlike the cases at bar, a motion for reconsideration was filed with the Administrative Law Judge *in advance* of the filing of the notice of appeal. Moreover, MESA, the

appellee in that case, did not object to reconsideration by the Judge on the merits even *after* the filing of the notice of appeal, and thus no precedent was set regarding an Administrative Law Judge's options in ruling upon a *timely* filed motion for reconsideration once a notice of appeal has been filed.

Since Judge Steiner is precluded from granting MESA's motion for reconsideration, MESA's motions to postpone its briefing date now before the Board are without merit and Old Ben's motions to determine the dates of filing for MESA's briefs on appeal must be granted. In light of the time it has taken to process these motions, MESA will be allowed 20 days.

### ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior, IT IS HEREBY ORDERED that MESA's motions to postpone determination of the due dates for its briefs on appeal in the above-listed cases ARE DENIED.

IT IS FURTHER ORDERED that Old Ben's motions to determine the due dates for MESA's briefs on appeal ARE GRANTED and the time for filing for each of the above-listed cases IS SCHEDULED for 20 days from the date of this order.

DAVID DOANE,  
*Chief Administrative Judge.*  
HOWARD J. SCHELLENBERG, JR.,  
*Administrative Judge.*

**ESTATE OF CECELIA SMITH VER-  
GOTE (BORGER), MORRIS A. (K.)**

**CHARLES AND CAROLINE J.  
CHARLES (BRENDALE)**

**5 IBIA 96**

Decided *May 21, 1976*

Appeal from an Administrative Law Judge's order determining compensation to be paid by the Yakima Tribe for the taking of an undivided one-half interest in estate land subject to the Act of Aug. 9, 1946, 60 Stat. 968, as amended by the Act of Dec. 31, 1970, 84 Stat. 1874.

Modified.

**1. Indian Lands: Tribal Rights in  
Allotted Lands—Indian Probate: Ya-  
kima Tribes: Generally—435.1**

Absent regulations requiring otherwise the most equitable valuation date would be the date the Tribe elects to purchase the property of a noneligible heir or devisee.

**2. Indian Lands: Tribal Rights in  
Allotted Lands—Indian Probate:  
Yakima Tribes: Valuation Reports—  
435.1**

The Board is not bound by the Bureau of Indian Affairs' appraisal, report and findings contained therein. Instead, the Board will give consideration to the complete record, including the BIA appraisal, report and findings in arriving at its findings and determination.

**APPEARANCES:** James B. Hovis, counsel for appellant, Yakima Tribe; Arthur W. Kirschenmann, counsel for appellant, Philip Brendale.

**OPINION BY BOARD  
MEMBER HORTON**

**INTERIOR BOARD OF  
INDIAN APPEALS**

*I. Background*

Under the authority of the Act of Aug. 9, 1946, 60 Stat. 968 (25 U.S.C. § 607 (1970)), as amended by the Act of Dec. 31, 1970, 84 Stat. 1874, the Yakima Tribe is entitled to acquire any interest in trust or restricted land within the Yakima Reservation which is either devised or descends to a person who is not an enrolled member of the Yakima Tribe with one-fourth degree or more blood of such tribe. By virtue of the 1970 Amendment, the foregoing statute further provides that if Yakima trust lands inherited by a noneligible heir as previously defined are desired by the Yakima Tribe, the heir who is to be preempted by the Tribe's election must be compensated by the fair market value of the property taken by the Tribe as determined by the Secretary of the Interior after an appraisal; otherwise, the Tribe may not take the property. Prior to the 1970 Amendment, the Yakima Tribe was not required to compensate noneligible heirs (persons not enrolled in the Yakima Tribe or enrollees with less than one-fourth degree Yakima blood) in order to receive their inherited trust lands.

By order dated Sept. 17, 1975, Administrative Law Judge Robert C. Snashall directed that the Yakima Tribe compensate Philip Brendale,

an enrolled Cowlitz Indian and sole heir of an undivided one-half interest in Yakima Allotment 124-4244, consisting of 160 acres allotted to Mary Charles, deceased, by the sum of \$40,000, plus interest, for the Tribe's election to acquire Philip Brendale's 80-acre interest in such allotment. Philip Brendale and the Yakima Tribe filed separate appeals from the above order which were docketed by the Board on Dec. 5, 1975.

Three estates have been consolidated in this controversy. Together they have produced a complicated probate record dating from 1958 which is detailed through Sept. 1974, in three prior decisions of the Board, *viz*, *Estate of Cecelia Smith (Borger)*, *Yakima Allottee No. 4161, Deceased*, 3 IBIA 56, 81 I.D. 511 (1974); *Estate of Morris A. (K.) Charles, Yakima Allottee No. 4247, Deceased*, 3 IBIA 68, 81 I.D. 517 (1974); and *Estate of Caroline J. Charles (Brendale)*, *Yakima Allottee No. 4240, Deceased*, 3 IBIA 91, 81 I.D. 505 (1974). Briefly summarized, these three opinions and the records upon which they are based disclose the following sequence of events pertinent to this appeal:

Cecelia Smith and Morris Charles, a/k/a Morris A. (K.) Charles, were the children of Mary Charles, deceased Yakima Allottee No. 4244, each of whom inherited a one-fourth interest in her allotment described as the SW  $\frac{1}{4}$  sec. 8, T. 7 N., R. 13 E., Willamette Meridian, Yakima County, Washington, containing 160 acres, hereafter de-

scribed as the Mary Charles Allotment.

Cecelia Smith died in 1958 and by her will left her one-fourth interest in the Mary Charles Allotment in equal shares to the daughters of her brother, Morris Charles, to wit: Caroline B. Charles and Mary (Andle) Andal, who each thereby acquired a one-eighth interest in the Mary Charles Allotment. Upon approval of Cecelia's will on May 15, 1959, it was determined that under the 1946 Act, *supra*, Caroline B. Charles was eligible to receive her interest as an enrolled member of the Yakima Tribe possessing at least one-fourth degree Yakima blood, whereas Mary Andal was found to be ineligible to receive her one-eighth interest. Accordingly, the interest sought to be devised to Mary Andal was distributed as intestate property to her father, Morris Charles, Cecelia's eligible heir at law by virtue of the 1946 Act, vesting in him an additional one-eighth interest in the Mary Charles Allotment and bringing his total interest therein to three-eighths.

Morris Charles died testate on Nov. 23, 1964. His will devised all of his property to his daughter, Caroline, which, if approved, meant that she would possess the full one-half interest in the Mary Charles Allotment (one-eighth acquired by devise from Cecelia Smith and three-eighths acquired by devise from Morris Charles).

On Apr. 20, 1964, however, prior to Morris Charles' Death, the Yakima Tribal Enrollment Committee

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issued a ruling that Caroline was incorrectly enrolled as one-fourth Yakima and found that she was only one-eighth Yakima. The Examiner of Inheritance in the Morris Charles estate (subsequently Administrative Law Judge), the late R. J. Montgomery, inquired of the Superintendent of the Yakima Indian Agency on Aug. 19, 1966, regarding the eligibility of Caroline Charles to inherit Yakima trust land. By response dated Aug. 23, 1966, the Superintendent certified to Judge Montgomery that Caroline was not eligible under the 1946 Act to inherit Yakima allotments.

Judge Montgomery conducted a hearing in the Morris Charles estate on October 17, 1966. Because Caroline Charles had instituted an appeal regarding her designation as only one-eighth Yakima, her attorney, Arthur Kirschenmann, who represents Philip Brendale in this appeal, submitted a written request to Judge Montgomery on October 24, 1966, suggesting that the order determining heirs in the Morris Charles estate await the result of Caroline's appeal concerning her blood quantum. By response dated Oct. 28, 1966, Judge Montgomery granted Mr. Kirschenmann's request.

It was not until Apr. 11, 1969, that a final Departmental decision was rendered on the issue of Caroline's tribal blood. The Secretary affirmed the Aug. 6, 1968, decision of the Commissioner of Indian Affairs which held, *inter alia*, that Caroline had been incorrectly enrolled as one-

fourth Yakima in 1956 and that by her own application for enrollment she had classified herself as one-eighth Yakima.

The Secretary's Apr. 11, 1969, decision was addressed to M. Kirschenmann. The record indicates that Judge Montgomery did not learn of the Department's disposition of the blood controversy until Mar. 24, 1972. One week later, on Mar. 31, 1972, Judge Montgomery entered his order determining heirs in the Morris Charles estate. In light of the December 31, 1970 Amendment to the Act of 1946, Caroline Charles was declared eligible to receive the interests devised her by Morris Charles, subject to a statutory right in the Yakima Tribe to purchase the property at its fair market value. But for the 1970 Amendment, which was expressly made applicable to all pending probate cases as well as future cases, Judge Montgomery would have been required to rule that all of the trust property devised to Caroline Charles would pass to the Tribe, with the United States as trustee, without any compensation due her.<sup>1</sup>

<sup>1</sup> The Yakima Tribe attacks the constitutionality of the Act of Dec. 31, 1970, *supra*, on grounds that the retrospective operation of the statute impairs the property rights of the Tribe which allegedly vested as of Morris Charles' death in 1964. (opening Brief of Appellant, Yakima Tribe, pp. 2, 9, 10, 17.) Since the Morris Charles estate was technically open on Dec. 31, 1970, no final order having been issued, it has been incumbent on this Board to apply the law in effect even if this works to the detriment of the Yakima Tribe. The Department of the Interior does not have the authority to declare a federal statute unconstitutional. *Estate of Benjamin Harrison Stowhy (Deceased Yakima Allottee No. 2455)*

(Continued)

On May 12, 1972, Judge Montgomery issued a Supplemental Order of Distribution in the estate of Morris Charles wherein he made a finding that the Yakima Tribe had elected to purchase the trust property devised to Caroline Charles in her father's will, pursuant to the provisions of the Act of Dec. 31, 1970, and Judge Montgomery's Mar. 31, 1972, order. In addition, his Supplemental Order noted that the Tribe had effected a transfer of funds in the amount of \$5,880.10 from its tribal account to the Special Deposits Account of the Morris Charles estate to satisfy the cost of purchase for the chosen property. This dollar figure coincided with a value given for the property in the Mar. 31, 1972, Order Approving Will, computed as of the date of Morris Charles' death, Nov. 23, 1964.

Caroline Charles died testate June 25, 1972. Her will, approved by order of Feb. 12, 1974, named her son, Philip Brendale, one of the appellants, sole devisee of her property.

On July 17, 1974, Philip Brendale petitioned for reopening the Morris Charles estate alleging, *inter alia*, that it was an error for the three-eighths interest in the Mary Charles Allotment inherited by his mother, Caroline Charles, to be purchased by the Yakima Tribe in 1972 for the value of the property prevailing at the date of Mor-

ris Charles' death, Nov. 23, 1964. Appellant Brendale also raised this question in an action brought in federal court.<sup>2</sup>

By prior orders this Board has previously stated its conclusion that it was incorrect for the Examiner of Inheritance to permit the Yakima Tribe to purchase Caroline Charles' inherited three-eighths interest in the Mary Charles Allotment, devised to her by the will of Morris Charles, at the 1964 appraised value of the land.

[1] In the three decisions simultaneously issued by the Board on Sept. 12, 1974, *supra*, remanding the captioned estates to an Administrative Law Judge for further proceedings, we held, and hereby reaffirm, that the proper valuation date for determining the fair market price to be paid by the Yakima Tribe for its purchase of all desired interests in the Mary Charles Allotment acquired by Caroline Charles, deceased, and presently, Philip Brendale, should be May 12, 1972. Absent controlling guidelines in either the statutes or regulations concerning the selection of a valuation date,<sup>3</sup> the Board concluded in

<sup>2</sup> Appellant's civil action, filed in the United States District Court for the Eastern District of Washington, No. C-74-21, has been held in abeyance pending final administrative action regarding this controversy in accordance with a court-approved stipulation of parties filed July 1, 1974.

<sup>3</sup> Implementing regulations concerning the Act of Dec. 31, 1970, *supra*, were published on Aug. 30, 1974, to be effective as of Sept. 30, 1974 (39 FR 31635). See 43 CFR 4.300-4.317. The Board has not considered these regulations controlling in this case in view of its Sept. 12, 1974, holding that the Yakima Tribe is authorized to purchase the subject interests in the Mary Charles Allotment for the fair

(Continued)

and Estate of Mary G. Guiney Harrison (Deceased Colville Allottee No. S-925), 1 IBIA 269, 79 I.D. 428 (1972).

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its remand that it would be most equitable in this case to charge the Yakima Tribe for the value of the property as of the time of the Tribe's election to purchase. As previously noted, it was on May 12, 1972, that the Examiner of Inheritance decreed the Tribe's election to purchase the three-eighths interest in the Mary Charles Allotment which had been devised to Caroline Charles by Morris Charles.<sup>4</sup>

Further, we stated in our remand that the Yakima Tribe's election to purchase the three-eighths interest in the Mary Charles Allotment from Caroline Charles, recognized by Judge Montgomery's May 12, 1972, Supplemental Order, should apply as well to her preexisting one-eighth interest in the Mary Charles Allotment which Caroline erroneously acquired from the 1959 probate of

Cecelia Smith's will.<sup>5</sup> Appellant Brendalé contests this requirement on appeal because no such election took place in 1972, but this argument is rejected for the very reasons we imposed the requirement in our Sept. 12, 1974, orders. In short, the evidence reflects that the Tribe should have been told of its right to purchase the one-eighth interest in 1972 and that if this had occurred, an election to purchase this additional interest would have been made at that time.<sup>6</sup>

On Nov. 29, 1974, Judge Montgomery issued a notice of hearing in accordance with the Board's simultaneous orders of Sept. 12, 1974. The hearing was held by Judge Montgomery on Jan. 13, 1975, and was intended to resolve the issue of the fair market value to be paid by the Yakima Tribe for appellant Brendalé's one-half interest in the

market value determined as of May 12, 1972.

As to Yakima tribal purchases determined to be subject to the above regulations, it is clear that fair market value is to be determined as of the date of a special hearing scheduled to determine value, after an appraisal and subsequent to the hearing determining heirs, or the date of any stipulation fixing the value. The appraisal must be made as of the date of the inspection of the property and the hearing determining value must be held within 6 months of that date; if it is not so held, a supplemental appraisal report is required.

<sup>4</sup> As there were no regulations in effect in 1972 explaining how a Tribe should accomplish an election for property under the 1970 Amendment, Judge Montgomery based his May 12, 1972, Supplemental Order on evidence that the Land Committee of the Yakima Tribe had voted to purchase Caroline Charles' trust properties at a meeting held Apr. 27, 1972, and that on May 8, 1972, the Tribe effected a transfer of \$5,880.10 from its Land Enterprise Account to the account of the estate.

<sup>5</sup> A Modification Order, *Nunc Pro Tunc*, was entered in the Estate of Cecelia Smith (Borger) on June 13, 1975, by the Administrative Law Judge in response to the Board's Sept. 12, 1974, instructions on remand. The Modification Order recites that Caroline Charles was not eligible under the Yakima Act of 1946 to inherit the one-eighth trust interest devised her by the decedent and in lieu thereof, Morris Charles is designated distributee of said property.

<sup>6</sup> The Tribe was first advised of its right to purchase the one-eighth interest in the Mary Charles Allotment possessed by Caroline Charles when Judge Montgomery entered his Feb. 12, 1974, Order Approving Will in the Estate of Caroline Charles. Thereafter, on Apr. 18, 1974, the Tribe effected a transfer of \$6,683.78 from its Land Enterprise Account to the account of the Estate of Caroline Charles towards the purchase of the one-eighth interest. The amount deposited was based on a BIA valuation of the one-eighth interest as of the date of Caroline Charles' death, June 25, 1972.

Mary Charles Allotment. Judge Montgomery died subsequent to the hearing, and his successor, Robert C. Snashall, issued a final order on Sept. 17, 1975, based upon the transcript of proceedings and other documents of record.

## II. *Fair Market Value*

Judge Snashall's order of Sept. 17, 1975, finds the total fair market value of appellant Brendale's interest in the Mary Charles Allotment, as of May 12, 1972, to be \$40,000. Although Judge Snashall does not reveal in his order how this figure was reached, the Board has independently evaluated all testimony and exhibits which were before the Administrative Law Judge and we separately find that the fair market value totals \$39,896. This value is determined from the following evidence:

First, it is apparent from the expert testimony provided at the hearing that the allotment in question is chiefly valuable for its timber. The entire 160-acre tract consists of approximately 152 acres of ponderosa pine and 8 acres of lodgepole pine. The Bureau of Indian Affairs provided an appraisal of the merchantable timber and land by way of an appraisal report dated Nov. 20, 1973. This report furnished an appraised valuation of the property as of June 25, 1972, having been prepared prior to the Board's Sept. 12, 1974, request for a BIA appraisal effective as of May 12, 1972. The fair market value quoted by the BIA for 80 acres as of the date cited

was \$26,756. Appellant Brendale produced an expert witness at the Jan. 13, 1975, hearing, Ronald T. Munro, who presented a separate appraisal report for the fair market value of the merchantable timber only. Mr. Munro's report, dated July 31, 1974, calculates the property's timber value as of May 1972, using conversion tables commonly employed in timberland appraisals. For Mr. Brendale's 80-acre interest, Mr. Munro valued the merchantable timber to be worth \$36,696.

[2] The above two appraisals differ in outcome primarily because the BIA appraisal computed less total volume of merchantable ponderosa pine as well as a lower stumpage value per board foot. The BIA estimate of timber volume was based on a prism cruise of the property in Nov. 1971. Although the Board is aware of the fact that the BIA appraisal represents an official report on behalf of the Department of the Interior, and not a study on behalf of any party, including the Tribe, we are not bound by whatever findings this report presents. Instead, the Board will give consideration to the complete record in arriving at its findings and determination. In the case at hand, the Board is persuaded that the most accurate appraisal of the fair market value for merchantable timber found on the Mary Charles Allotment was provided by Mr. Munro.

Mr. Munro concluded that in May 1972, there was a total merchantable timber volume of 1,305,600 board feet on the Mary Charles

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Allotment. Trees of less than 11 inches in diameter at breast height are excluded from this figure. Of this total, 1,237,072 board feet were derived from ponderosa pine which had a weighted average stumpage value of \$58.32 per thousand board feet. For all timber species, Mr. Munro arrived at a total stumpage value on the subject property of \$73,392 for the complete tract (160 acres). Dividing this total by one-half provides the timber value of \$36,696 for Philip Brendale's interest, previously quoted. This sum is approximately \$13,000 higher than the figure derived from the BIA appraisal for 80 acres.

Mr. Munro testified he was only qualified to appraise the timber value of the property and not the land itself. While the land in question is chiefly valuable for its timber, it is obvious that timberland still holds some value once timber is cut.<sup>7</sup> The BIA appraisal concluded that the land should be valued at \$40 per acre above the appraised value for all merchantable timber and this value was not refuted by any convincing evidence. Accordingly we add \$3,200 land value to the \$36,696 timber value and arrive at a final fair market value of \$39,896 for an undivided one-half interest in the Mary Charles Allotment as of May 12, 1972.

<sup>7</sup> This is not the same as separately evaluating timber and land at the respective best uses of each. This objection was made by the Tribe with respect to other appraisals offered by appellant Brendale at the hearing.

### III. Additional Procedures

Although the peculiar circumstances of this case have rendered existing regulations generally inapplicable to this proceeding (see footnote 2), the course the Board adopts in bringing this matter to a close generally coincides with the procedures set forth in 43 CFR 4.310 *et seq.* Specifically, it shall be ordered that *within 20 days after the receipt of this decision* by the Tribe, it must file with the Superintendent of the Yakima Indian Agency a specific list of all interests it elects to take from appellant Philip Brendale. It shall be conclusively presumed that the Tribe has released all claim to any interest not listed. The Tribe may decide that it does not want any of the property. If so, the Superintendent must be informed of such rejection *within 20 days of receipt of this decision*. In such event, the Tribe will be allowed full reimbursement for all money deposited toward the purchase of interests in the Mary Charles Allotment. The Tribe has thus far deposited a total of \$12,563.88 toward the purchase of an undivided one-half interest. (See footnotes 4 and 6, *supra*.)

Within 1 year from the date of filing the formal election to take with the Superintendent, as above described, the Tribe shall be obligated to pay the balance due (\$27,332.12 on the complete interest of appellant Brendale), plus interest on the unpaid balance at a rate of 8 per-

cent per annum.<sup>8</sup> The payment deadline may be extended for no more than two 6-month periods.

Administrative Law Judge Snashall shall retain jurisdiction of this matter for 2 years to oversee the necessary transactions and rule on any extension requests. Upon payment by the Tribe of the full fair market value for its interest, Judge Snashall, after certification of said fact by the Superintendent, shall make a finding that the required fair market value has been paid and he shall issue a decision that the United States holds the title to such interest in trust for the Tribe.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the final order entered by Administrative Law Judge Robert C. Snashall on September 17, 1975, be, and the same is hereby modified in accordance with the terms herein prescribed.

This decision is final for the Department.

WM. PHILIP HORTON,  
*Member of the Board.*

WE CONCUR:

MITCHELL J. SABAGH,  
*Administrative Judge.*

ALEXANDER H. WILSON,  
*Administrative Judge.*

<sup>8</sup> Although the Board's decision finds the date of taking of the subject property by the Tribe to be May 12, 1972, it would be inequitable to assess interest on the unpaid balance now established as of that date because of the extenuating circumstances in this case.

# ESTATE OF TEMENS (TIMENS) VIVIAN GARDAFEE

5 IBIA 113

Decided *May 27, 1976*

Appeal from final order determining fair market value of certain allotted lands on the Yakima Reservation.

REVERSED and REMANDED.

1. Indian Lands: Tribal Rights in Allotted Lands—Indian Probate: Yakima Tribes: Generally—435.0

Absent controlling guidelines in the statute concerning valuation date (fair market value), it is more equitable to charge the Yakima Tribe the fair market value of the property as of the date the Tribe elected to purchase same, *i.e.*, Jan. 25, 1974.

APPEARANCES: Hovis, Cockrill and Roy, by Pat Cockrill, Esq., for appellant; H. W. Felsted, Esq., for appellee.

OPINION BY  
ADMINISTRATIVE JUDGE  
SABAGH

INTERIOR BOARD OF  
INDIAN APPEALS

The above-entitled matter comes before this Board on appeal from the final order of Administrative Law Judge Robert C. Snashall, issued Aug. 25, 1975, after a hearing upon petition and demand for valuation hearing brought by Ervin Ray, a noneligible heir, under the provisions of the Yakima Act of Dec. 31, 1970 (84 Stat. 1874, 25 U.S.C. § 607 (1970)), pursuant to 43 CFR 4.305.

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Temens Vivian Gardafee died intestate on Dec. 11, 1971, leaving certain heirs at law and trust properties on the Yakima Reservation. Interests in said trust properties were subject to divestiture by Yakima Tribal purchase pursuant to 25 U.S.C. § 607 (1970). The Tribe elected to purchase said trust properties described in attachments to Supplemental Order of Distribution dated January 25, 1974, and referred to as Tract Nos. 124-3283 (Temens Vivian Gardafee) and 124-2173 (Jason Sam). The Tribe entered a written stipulation concerning the value of that particular portion of the estate purchased under the exercise of option designated as Allotment No. 124-2173 (Jason Sam), consequently that tract is not at issue here.

The land designated Allotment 124-3283 (Temens Vivian Gardafee) consisting of 80 acres was appraised by the Bureau of Indian Affairs on or about Mar. 9, 1973, at a fair market value of \$11,500 as of Dec. 11, 1971, date of death of Temens (Timens) Vivian Gardafee.

As previously stated, a Supplemental Order of Distribution was entered by the Judge on Jan. 25, 1974, evidencing the Tribe's election to purchase tract no. 124-3283, and \$11,500 was deposited in the estate account as the estimated just compensation (fair market value). The Order further vested all rights, title and interest in the Tribe as of the date of the Order, Jan. 25, 1974.

Ervin Ray, the surviving spouse and noneligible heir, petitioned for a valuation hearing contending in substance that the property in question was under valued. A hearing was set for Feb. 11, 1975, and subsequently continued to Apr. 6, 1975, to afford the petitioner an opportunity to obtain counsel. Due to the untimely death of Judge Richard Montgomery, the matter was further continued to July 25, 1975. On July 25, 1975, the aforementioned petitioner appeared with counsel. Neither the Tribe nor its counsel appeared. Counsel for the Tribe steadfastly maintained that its failure to appear was due to the mistaken belief it had been granted a continuance to a future date.

Hearing was held, testimony taken and exhibits offered. A Final Order was entered on Aug. 25, 1975, wherein it was determined that the fair market value at the time of taking was \$800 per acre, or \$64,000 for the 80 acres in question. The Judge further concluded that interest at the rate of eight (8) percent per annum should be paid on \$52,500 remaining outstanding from the 25th of Jan. 1974 until the the deficiency is deposited into the estate IIM account.

The Tribe, through counsel, appealed contending among other things, that:

- 1) The regulations adopted by the Department were unconstitutional because they have a retroactive effect.

- 2) The Judge erred in failing to determine in his Final Order the

appropriate time of taking for purposes of 25 U.S.C. § 607 (1970).

3) The Judge erred in concluding that the 80-acre allotment was worth \$64,000 based on a valuation of \$800 per acre in the absence of competent and material evidence sufficient to meet the petitioner's burden of proof.

Counsel for the Tribe argues that the proper valuation date for determining the fair market value to be paid by the Yakima Tribe for its purchase of all desired interests should be the date of death of Temens Gardafee. We cannot agree. We believe that the proper valuation date for determining the fair market value to be paid by the Yakima Tribe for its purchase of all desired interests to be Jan. 25, 1974, the date the Supplemental Order of Distribution was entered by Judge Snashall evidencing the Tribe's election to purchase subject property and the Tribe's deposit of \$11,500 in the estate account as estimated just compensation (fair market value).

[1] Consequently, absent controlling guidelines in the statute concerning the selection of a valuation date, the Board finds that it would be more equitable in this case to charge the Yakima Tribe the fair market value of the property as of the date the Tribe elected to purchase, *i.e.*, Jan. 25, 1974.

Although we are of the opinion that conformance with the regulations adopted by the Department is not a prerequisite, in the interest of an orderly and equitable disposi-

tion of this matter, the course the Board adopts coincides with certain of the procedures set forth in 43 CFR 4.310 *et seq.* Department regulations prescribing the manner by which fair market value shall be determined in Yakima Tribal purchases initiated pursuant to the Act of Dec. 31, 1970, *supra*, did not become effective until Sept. 30, 1974. Because of our determination that the proper valuation date in this case is Jan. 25, 1974, we conclude that regulations implemented after that date which are tailored to a newly adopted valuation scheme should be followed only to the extent practicable. *See Estates of Cecelia Smith Vergote (Borger), Morris A. (K.) Charles and Caroline J. Charles (Brendale)*, 5 IBIA 96, 83 I.D. 209 (1976).

Based upon the record as presently constituted we are unable to arrive at a fair market value for tract No. 124-3283 (Temens Vivian Gardafee) at the time of taking (Jan. 25, 1974).

The record includes an appraisal report and summary dated Mar. 9, 1973, from the Bureau of Indian Affairs, Branch of Real Estate Appraisal, wherein it is determined in 1973 that the fair market value of this property at the time of death of Temens Vivian Gardafee, Dec. 11, 1971, was \$11,500. The record further contains two letter appraisals submitted by Ervin Ray, one dated May 2, 1974, signed by Mark W. Maughan and R. S. Lawrence, the other dated June 19, 1975, signed by Robert S.

Lawrence. The May 2, 1974, appraisal after an on-site inspection on Apr. 26, 1974, values tract No. 124-3283 at \$400 per acre. The June 19, 1975, appraisal after an on-site inspection on May 16, 1975, values the same tract at \$800 per acre. At the hearing, Mr. Lawrence testified that he made his appraisal to reflect the fair market value of the property in question on May 16, 1975. Upon being advised that any determination would have to reflect the fair market value as of Feb. 11, 1975, Mr. Lawrence testified that the fair market value on Feb. 11, 1975, was \$800 per acre or \$64,000 for the 80-acre tract.

We further note that only 59 of the 80 acres were being utilized by the lessee prior to expiration of the lease, 2 acres are in a county road right-of-way, and about 19 acres are undeveloped lands suitable for development for irrigation receiving irrigation water from a deep well. None of the foregoing items was considered in Mr. Lawrence's appraisal. Mr. Lawrence, moreover, made no comparison of the property in question to other properties in the immediate vicinity. Finally, we are of the opinion that prior to the beginning of the hearing in July 1975, Judge Snashall should have requested and received from the Bureau of Indian Affairs, an appraisal report with a summary thereof, made on the basis of the fair market value as of the date of inspection of the property.

We would consequently remand the case for a hearing de novo for

the purpose of determining the fair market value of tract No. 124-3283 as of Jan. 25, 1974, with all interested parties having the opportunity to participate.

Preliminary to the hearing, the Judge should issue an Order to the Superintendent, Bureau of Indian Affairs, for an appraisal of the decedent's interest and the filing of an appraisal report with a summary thereof on the basis of the fair market value as of the date of the inspection of the property and also to reflect the fair market value as of Jan. 25, 1974. A copy of the new summary shall be mailed by the Judge to the Tribe and affected heirs with opportunity for all interested parties to examine and copy at their own expense the full appraisal report. In addition, all members of the Branch of Real Estate Appraisal involved in the appraisal should be available for examination and/or cross-examination.

At the hearing, each party, *i.e.*, Ervin Ray and Yakima Tribe, attacking the valuation of the interest shown by the appraisal report shall have the burden of proving his own position.

Further, it shall be ordered that within 20 days after receipt of the Judge's decision, in the event that an appeal is not taken, the Tribe must file with the Superintendent of the Yakima Indian Agency, a specific list of all interests it elects to take from surviving spouse, Ervin Ray. It shall be conclusively presumed that the Tribe has released all claims to any interest not listed.

Should the Tribe decide that it does not want part or all of the surviving spouse's interest, the Superintendent must be informed of such rejection within 20 days of receipt of the decision. In such event, the Tribe will be allowed full reimbursement for all moneys deposited toward the purchase of the interest in question included in the estate account.

Within 1 year from the date of filing the formal election to take with the Superintendent, the Tribe shall pay into the estate account any balance determined by the Judge to be due, plus interest on the unpaid balance at a rate of 8 percent from the date of the filing of the formal election. The payment deadline may be extended for no more than two 6-month periods.

Judge Snashall shall retain jurisdiction of this matter for a period of 2 years to oversee the necessary transactions and to rule on any extension requests. Upon payment by the Tribe of the full market value for its elected interest, Judge Snashall, after certification of said fact by the Superintendent, shall make a finding that the required fair market value has been paid and he shall issue a decision that the United States holds the title to such interest in trust for the Tribe.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, we REVERSE the Final Order issued Aug. 25, 1975, and REMAND the matter to the Administrative

Law Judge for hearing de novo pursuant to the dictates referred to *supra*, to determine the fair market value of tract No. 124-3283 (Temens Vivian Gardafee) as of Jan. 25, 1974.

MITCHELL J. SABAGH,  
*Administrative Judge.*

WE CONCUR:

WM. PHILIP HORTON,  
*Member of the Board.*

ALEXANDER H. WILSON,  
*Administrative Judge.*

ASSOCIATED DRILLING, INC.

6 IBMA 153

Decided May 27, 1976

Appeal by Associated Drilling, Inc., from that part of an initial decision by Administrative Law Judge William Fauver (Docket No. PITT 74-1066-P), dated Nov. 18, 1976, finding Associated Drilling, Inc. in default in a civil penalty proceeding brought pursuant to sec. 109(a) of the Federal Coal Mine Health and Safety Act of 1969.

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Hearings: Powers of Administrative Law Judges

The authority of an Administrative Law Judge to issue show cause orders pursuant to 43 CFR 4.544(b) necessarily implies the authority to consider whether a response is adequate in showing cause why a default decision should not be entered against the respondent.

May 27, 1976

**APPEARANCES:** Ira Smades, Esq., for respondent, Associated Drilling, Inc.; Thomas A. Mascolino, Esq., Assistant Solicitor, and Stephen Kramer, Esq., Trial Attorney, for appellee, Mining Enforcement and Safety Administration.

*OPINION BY ADMINISTRATIVE JUDGE SCHELLENBERG*

*INTERIOR BOARD OF MINE OPERATIONS APPEALS*

*Background.*

On June 28, 1974, the Mining Enforcement and Safety Administration (MESA) brought a proceeding for the assessment of civil penalties with respect to alleged violations of mandatory safety standards against Associated Drilling, Inc. (respondent), pursuant to sec. 109(a) of the Federal Coal Mine Health and Safety Act of 1969.<sup>1</sup> The alleged violations occurred at the respondent's Kephart Mine located in Clearfield County, Pennsylvania.

On Mar. 4, 1975, the Administrative Law Judge (Judge) issued a Notice of Hearing Term setting the date of June 23, 1975, for a hearing on the merits. Moreover, this Notice required, *inter alia*, the following:

In preparation for the Hearing the parties are directed to complete the following prehearing requirements not later than June 9, 1975:

(1) Exchange lists of witnesses along with a synopsis of the testimony expected of each witness.

(2) Exchange lists of exhibits and, at the request of a party, to produce exhibits to the party with the opportunity to examine and copy same.

(3) File with the undersigned Judge:

(a) the parties' exhibit lists, and lists of witnesses with synopses of the testimony expected of the witnesses.

(b) any stipulation reached as to the facts, exhibits, and issues.

Failure by any party to comply with the above prehearing requirements will subject the deficient party to a show cause order and possible default decision. In the event of a default by the operator, final decision will be rendered on the official record and any additional evidence that the presiding Judge deems to be necessary to be added to the record.

[Dec. 3]

On Apr. 1, 1975, MESA filed a Prehearing Statement with the Judge and sent a copy to counsel for respondent (the date of service thereof being Mar. 31, 1975). No prehearing statement was filed by respondent on or before June 9, 1975.

On June 10, 1975, the Judge, in accordance with 43 CFR 4.544(b), issued an Order to Show Cause and Cancellation of Hearing in which he ordered (1) the June 24 hearing canceled and (2) the respondent to show cause by July 1, 1975, why it should not be held in default for failure to file a prehearing statement.

On June 25, 1975, respondent filed both a prehearing statement and its response to the Order to Show Cause.

<sup>1</sup> 30 U.S.C. § 819 (a) (1970).

On July 10, 1975, the Judge issued a Default Decision and Order finding respondent's response inadequate to show cause why a default decision should not be entered against it.

On July 28, 1975, respondent filed a Notice of Appeal with the Board and on Aug. 21, 1975, a Brief in support thereof. On Sept. 11, 1975, MESA filed a reply brief with the Board.

On Sept. 23, 1975, the Board issued an Order Dismissing Appeal (IBMA 76-9) declaring the Judge's decision an interim order and directing further action by the parties without prejudice to the rights of the parties to challenge the instant order in any appeal filed subsequent to the issuance of an initial decision.

On Nov. 18, 1975, the Judge issued his Decision based upon the proposed findings, conclusions and recommendations by both parties as to the amount of civil penalties and assessed respondent \$341.

On Dec. 1, 1975, respondent filed a Notice of Appeal with the Board and on Dec. 23, 1975, a brief in support thereof. On Dec. 30, 1975, MESA filed a reply brief with the Board.

### *Contentions of the Parties*

Respondent contends that it has been severely prejudiced as a result of the Judge's Default Decision in that it has been denied the opportunity to cross-examine MESA's witnesses and to introduce its defenses to the alleged violations. Al-

though admitting that its prehearing statement was inadvertently not filed and that technically the procedural order of the Judge issued in Mar. was not complied with, it maintains that this oversight was not willful, but constituted "simply a technical defect in timely filing which does not prejudice MESA's ability to prepare its case" (Respondent's brief, Exhibit "A," p. 4). Respondent draws on federal case precedents and the Federal Rules of Civil Procedure to support its contentions. In this vein, it proposes an analogy between the power granted to a District Court Judge under Rule 83 of the Federal Rules of Civil Procedure and that discretionary power of an Administrative Law Judge to dismiss an action summarily. Finally, it suggests that the language of 43 CFR 4.544 "unnecessarily discriminates against the operator and fails to provide a similar remedy to the operator in the event of a default by MESA" (Respondent's brief, Exhibit "A," page 11).

In its reply brief MESA submits that the Judge acted in accordance with the powers granted him under 43 CFR 4.482(a) (5) and did not abuse his discretion. With respect to the alleged discriminatory charge concerning sec. 4.544, it further argues that neither the Board nor the Judge has the authority to invalidate rules and regulation, citing *MESA v. Peabody Coal Company*, 4 IBMA 137, 138, 1974-1975 OSHD par. 19,685 (1975).

May 27, 1976

*Issue Presented on Appeal*

Whether the Judge abused his discretion in finding the respondent, Associated Drilling, Inc., in default.

*Discussion*

The regulation central to this appeal is 43 CFR 4.544(b) which states:

(b) *Failure to respond to prehearing order.* Where the respondent fails to file a response to a prehearing order the administrative law judge may issue an order to show cause why the operator should not be considered in default and the case disposed of in accordance with paragraph (a) of this section.<sup>2</sup> [Italics supplied.]

The authority to issue a show cause order imparted to the Judge by sec. 4.544 cannot be so narrowly construed as to deny him authority to rule on whether a party's response to such an order is adequate or not. The Board considers such authority

to be implied in the above regulation. In finding the response of "inadvertence" insufficient, the Judge explained his determination by stating:

\* \* \* Respondent's contention that there is no adequate basis in law for a default decision based on its failure to comply with the prehearing requirements is without merit. Sec. 4.544 of 43 CFR clearly provides for summary disposition in civil penalty proceedings where an operator (a) fails to file an answer to MESA's petition for civil penalty, (b) fails to respond to a prehearing order or (c) fails to appear at a hearing. Respondent's failure to comply with the prehearing requirements of the Notice of Hearing subjected it to an order to show cause under 43 CFR 4.544(b), and its failure to provide an adequate explanation for this noncompliance as provided in the Order subjects it to a default decision under 43 CFR 4.544(a).

\* \* \* \* \*

Respondent further contends that its failure constituted only a technical defect which was not of such a serious nature as to warrant a default decision. However, this position reflects a lack of understanding of the importance of prehearing procedures in administrative adjudicatory proceedings. The fairness and efficiency of coal mine safety and health hearings are substantially enhanced by the use of prehearing procedures, which require simplification of the issues, limit hearings to matters in genuine dispute, remove the element of surprise from the hearing, require adequate preparation for the hearing, and require the parties to make a serious effort before the hearing to explore settlement and stipulation of facts and issues. The prehearing process is essential to insure that the hearing is efficiently and professionally utilized and not wasted on irrelevant or unnecessary matters. \* \* \*

\* \* \* \* \*

<sup>2</sup> The language of 43 CFR 4.544(a) reads as follows:

"(a) *Failure to answer.* Where the respondent fails to file a timely answer to the Mining Enforcement and Safety Administration's petition for assessment of civil penalty, the Office of Hearings and Appeals will issue an order to show cause why the respondent should not be held in default. If the order to show cause is not satisfied as provided in the order, the respondent will be deemed to have waived his right to hearing and the administrative law judge may assume for purposes of the assessment: (1) That each violation listed in the petition occurred; and (2) the truth of any fact alleged in any order or notice concerning such violation. In order to issue an initial decision assessing an appropriate penalty for each violation cited in accordance with § 4.545(a), an administrative law judge shall either conduct such hearing or request such information from the Bureau, including proposed findings, as he deems necessary and proper."

Without adequate prehearing requirements, the settlement of a mine safety penalty proceeding, or the elimination of unnecessary issues, is frequently not achieved until the day of the hearing. It is plainly wasteful to have the judge, inspectors and other witnesses detained at the courthouse while attorneys conduct settlement or stipulation conferences which could, and should, be held beforehand. In addition, without adequate prehearing requirements, substantial time is often wasted by the examination of witnesses or documents on facts which are not in genuine dispute or by questioning or arguments on irrelevant or unnecessary issues. \* \* \*

The above practices not only waste mine safety program resources in salaries, per diem, travel, courtroom costs and court reporter fees, but most importantly they result in the unnecessary removal of inspector-witnesses from vital mine inspection duties. They also drain the industry of key mine supervisors who are needlessly detained away from the mines. \* \* \* The ends of justice as well as those of efficiency are thus additionally served by assisting the judge in reaching a just determination of the controversy. Accordingly, prehearing procedures are deemed by this Judge to be essential, and not a mere "technicality," as Respondent contends.

Respondent further contends that an entry of a default decision in this case would be an arbitrary exercise of administrative powers and thus would constitute an abuse of discretion by denying Respondent " \* \* \* opportunity to appear and present testimony on the merits or to consult with counsel for MESA in an attempt to compromise and settle these matters." But Respondent ignores the fact that prehearing procedures are designed to insure that counsel explore settlement and stipulations in advance of the hearing so that the hearing will provide an effective and orderly administration of justice. It cannot be said that Respondent was denied an opportunity to "compromise and settle" as it was given three months notice in advance of the

date set for completion of the prehearing requirements. [Italics added.]

[Dec. 2-4]

The Board finds respondent's contentions unconvincing and demonstrative of no abuse of discretion by the Judge. His extensive reasoning in determining the instant response inadequate is well-stated and represents a thorough expression of why such regulations are promulgated.

With respect to respondent's contention that the language of section 4.544 "unnecessarily discriminates against the operator," we refer to our decisions in *Buffalo Mining Company*<sup>2</sup> and *MESA v. Peabody Coal Company*, *supra*, in which we held the power to declare invalid the rules and regulations promulgated by the Secretary under the Act lies outside the scope of this Board's jurisdiction. Further, it is not within the province of the Board to rule on any issue of a constitutional nature, a matter solely limited to the jurisdiction of the judiciary.

Based upon the foregoing, we find no abuse of discretion by the Judge in issuing the default decision finding respondent's response to the show cause order inadequate.

### ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Judge's decision in the above-captioned case IS AFFIRMED and that Associated Drilling, Inc., pay penalties in the

<sup>2</sup> 2 IBMA 226, 245, 80 I.D. 630, 1973-1974 OSHD par. 16,618 (1973).

May 27, 1976

amount of \$341 on or before 30 days from the date of this decision.

HOWARD J. SCHELLENBERG, JR.,  
*Administrative Judge.*

I CONCUR:

DAVID DOANE,  
*Chief Administrative Judge.*

## OLD BEN COAL COMPANY

6 IBMA 163

Decided *May 27, 1976*

Appeal by the Mining Enforcement and Safety Administration from a decision by Administrative Law Judge Malcolm P. Littlefield in Docket No. M 72-34 granting Old Ben Coal Company's Petition for Modification of the Application of 30 CFR 75.316-2(b) under sec. 301(c) of the Federal Coal Mine Health and Safety Act of 1969.

Vacated and petition dismissed.

### Federal Coal Mine Health and Safety Act of 1969: Modification of Application of Mandatory Safety Standards: Generally

A petition for modification of the application of a regulation establishing criteria for approval of individual mine ventilation plans does not state a claim upon which relief can be granted under sec. 301(c) of the Act because such regulation is not a mandatory safety standard. 30 U.S.C. §§ 802(l), 861(c) (1970).

**APPEARANCES:** Thomas H. Barnard, Esq., and John P. Dunn, Esq., for appellant, Old Ben Coal Company; Richard V. Backley, Esq., and John H. O'Donnell, Esq., for appellee, Mining Enforcement and Safety Administration.

## MEMORANDUM OPINION AND ORDER

### INTERIOR BOARD OF MINE OPERATIONS APPEALS

The Mining Enforcement and Safety Administration (MESA) appeals to us to reverse the decision in Docket No. M 72-34 by Administrative Law Judge Littlefield granting a petition for modification by Old Ben Coal Company (Old Ben) filed under sec. 301(c) of the Federal Coal Mine Health and Safety Act of 1969. The relief sought by Old Ben was modification of the application of 30 CFR 75.316-2(b) to permit usage of fire retardant wooden stoppings in panel and room entries of its No. 24 Mine.<sup>1</sup>

<sup>1</sup> Sec. 75.316-2(b) of 30 CFR provides as follows:

"Criteria for approval of ventilation system and methane and dust control plan.

This section sets out the criteria by which District Managers will be guided in approving a ventilation system and dust control plan on a mine-by-mine basis. Additional measures may be required. A ventilation system and dust control plan not conforming to these criteria may be approved, providing the operator can satisfy the District Manager that the results of such ventilation system and dust control plan will provide no less than the same measure of protection to the miners.

\* \* \* \* \*

(b) Permanent stoppings, overcasts, undercasts, and shaft partitions should be constructed of substantial, incombustible material, such as concrete, concrete blocks, cinder block, brick or tile, or some other incombustible material having sufficient strength to serve the purpose for which the stopping or partition is intended. In heavy or caving areas, timbers laid longitudinally skin to skin may be used. Such permanent stoppings should be erected between the intake and return air-courses in entries and should be maintained to and including the third connecting cross-cut on the faces of the entries. Permanent stoppings should be used to separate belt haulage entries from entries used as intake and return air-courses."

Judge Littlefield granted this relief, holding that fire retardant wooden stoppings are as safe or safer than the permanent incombustible stoppings referred to in the subject regulation.<sup>2</sup> On appeal, MESA contends that Judge Littlefield's ultimate conclusion is not supported by the substantial evidence of the record considered as a whole.

We find it unnecessary to address ourselves to MESA's contention because there is a jurisdictional impediment which impels us to vacate the decision below and to dismiss Old Ben's petition.

Under sec. 301(c), we have subject matter jurisdiction over petitions for modification of the application of "*any mandatory safety standard*." The fatal defect in Old Ben's petition is that 30 CFR 75.316-2(b) is not a mandatory safety standard within the meaning of the legislative definition of that term embodied in sec. 3(l) of the Act, as interpreted by the Board. 30 U.S.C. § 802(l) (1970). *See In the Matter of: Affinity Mining Company v. MESA*, 6 IBMA 100, 83 I.D. 108, 1975-1976 OSHD par. 20,651 (1976). That regulation was promulgated under section 508 of the Act, 30 U.S.C. § 957 (1970), and, as we said in *Valley Camp Coal Company*, 3 IBMA 176, 181, 81 I.D. 294, 1973-1974 OSHD par. 17,849 (1974), it merely establishes criteria

for the guidance of district managers in discharging their approval function with respect to proposed ventilation plans adopted by an operator pursuant to sec. 303(o) of the Act. 30 U.S.C. § 863(o) (1970), 30 CFR 75.316.

In holding that 30 CFR 75.316-2 (b) is not a mandatory safety standard and dismissing the subject petition for modification on that basis, we emphasize that we are in no way foreclosing an operator or a representative of miners from obtaining administrative relief in cases where enforcement actions have been taken by MESA on the basis of an erroneous interpretation of this or any other set of criteria for plan approval. However, the instant controversy is not such a case. *Compare Bishop Coal Company*, 5 IBMA 231, 82 I.D. 533, 1975-1976 OSHD par. 20,165 (1975), *appeal pending sub nom. Bennett v. Kleppe*, D.C. Cir. No. 75-2158, *with Itmann Coal Company*, 6 IBMA 121, 129, 83 I.D. 175, 1975-1976 OSHD par. 20,628 (1976).

#### ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision in the above-captioned docket IS VACATED and the subject petition for modification IS DISMISSED.

DAVID DOANE,  
*Chief Administrative Judge.*

HOWARD J. SCHELLENBERG, JR.,  
*Administrative Judge.*

<sup>2</sup> The subject petition assumes that a proposed ventilation plan containing provisions for fire retardant wooden stoppings would not be fit for approval under the foregoing criterion. We intimate no views as to the soundness of this assumption.

June 11, 1976

# ADMINISTRATIVE APPEAL OF JOE McCOMAS

5 IBIA 125

Decided *June 11, 1976*

Appeal from a decision of the Commissioner, Bureau of Indian Affairs, affirming decision of the Anadarko Agency Acting Superintendent declaring farming and grazing lease no. 31395 void.

**Affirmed.**

## 1. Indian Tribes: Constitution By-laws and Ordinances—Indian Tribes: Tribal Authority

Acts of Tribal Chairmen done in contravention of their respective Tribal Constitutions and Bylaws are void from their inception and not binding upon their respective Tribes.

## 2. Federal Employees and Officers: Authority to Bind Government

Unauthorized acts by an employee of the Bureau of Indian Affairs cannot serve as the basis for conferring rights not authorized by law. Moreover, neither the Secretary of the Interior nor the Department is bound or estopped by such unauthorized acts.

**APPEARANCES:** Pain and Garland, by John W. Garland, Esq., for appellant.

*OPINION BY ADMINISTRATIVE JUDGE SABAGH*

## INTERIOR BOARD OF INDIAN APPEALS

The above-entitled matter comes before the Board on appeal from the decision of the Commissioner of

Indian Affairs dated Dec. 12, 1975, affirming the decision of the Acting Superintendent, Anadarko Agency, dated Apr. 17, 1975, invalidating farming and grazing lease No. 31395 covering lands of the Wichita, Delaware and Caddo Tribes containing approximately 327 acres.

The Acting Superintendent concluded in his decision that the purported lease was void from its inception because the tribal chairmen executed said lease without the benefit of enabling resolutions of their respective Executive Committees authorizing their actions as provided for by their respective constitutions and bylaws.

Joe McComas appealed the Acting Superintendent's decision to the Area Director who, by decision of June 4, 1975, sustained the Acting Superintendent. An appeal was then taken to the Commissioner, Indian Affairs, who in turn by decision of Dec. 12, 1975, affirmed the decision of the Acting Superintendent. A timely appeal was then taken to this Board.

The appellant in substance contends that the decision of the Acting Superintendent is contrary to law. We disagree.

The Act of June 18, 1934, c. 576 § 16, 48 Stat. 987, provides, among other things, that:

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote

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of the adult members of the tribe \* \* \*

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: \* \* \* to prevent the sale, disposition, *lease* \* \* \* of Tribal lands \* \* \* without the consent of the tribe \* \* \*. 25 CFR 476. [Italics added.]

Article VI of the Constitution and Bylaws of the Delaware Tribe of Western Oklahoma provides that—

The executive committee shall have full authority to act on behalf of the tribe in all matters upon which the tribe is empowered to act now or in the future \* \* \*.

Article V of the Constitution and Bylaws of the Caddo Indian Tribe of Oklahoma provides that—

Sec. 1. There shall be an Executive Committee which shall consist of the officers provided in Article IV. This committee shall have the power to appoint subordinate committees and representatives, to transact business and otherwise speak or act on behalf of the Caddo Indian Tribe in all matters on which the said Indians are empowered to act now or in the future \* \* \*.

Article V of the Governing Resolution of the Wichita Indian Tribe provides that—

There shall be an Executive Committee which shall consist of the officers and councilmen as provided in Article IV. This Committee shall have power to appoint subordinate committees and representatives, to transact business and otherwise speak or act on behalf of the Tribe in all matters on which the Tribe is empowered to act now or in the future.

The Secretary of each of the Tribes is required to keep an accurate account of all proceedings

and official records of the council and the executive committees.

Sec. 131.3(4) of the Departmental regulations provides that tribes or tribal corporations acting through their appropriate officials may grant leases. See 25 CFR 131.3(4).

It appears from the record that lease No. 31395 was never before any of the named tribal executive or business committees for consideration. Although the appellant indicates that he was present at a joint meeting of the three tribes at the Brown Office Building, Anadarko, Oklahoma, at which said lease was purportedly presented to the three tribes for consideration, it has not been corroborated by tribal resolution, minutes, or other evidence that said lease contract was approved by joint tribal executive or business committees. Instead, it appears that lease contract No. 31395 was executed by tribal chairmen of the three tribes without authorization from the respective executive or business committees.

The record includes individual affidavits of the tribal chairmen wherein they indicate that they intended to bind their respective tribe and that they believed that they had acted properly.

The record further includes an affidavit of Harry Guy, Chairman of the Caddo Tribe, executed subsequent to the above affidavits wherein he contradicts his previous affidavit by stating that he signed the affidavit without full knowledge of all the facts pertaining to the

June 22, 1976

subject lease and that it is now his intention not to bind the tribe for the term of the lease. Moreover, the appellant indicates that he had leased the land in question on prior occasions and in all said negotiations he had always dealt only with the tribal chairmen (after dissolution of the Land Management Committee), *who held themselves out as having authority to lease this property.*

[1] We find that lease No. 31395 was executed by the tribal chairmen of the Delaware, Caddo and Wichita Tribes in contravention of their Tribal Constitutions and Bylaws and without authorization from their respective executive or business committees and consequently said lease was void from its inception and not binding on their respective Tribes.

[2] We further find that the Superintendent, Anadarko Agency, approved the said lease in the mistaken belief that the tribal chairmen had the authority to execute the same in accordance with their respective Tribal Constitutions and Bylaws. Moreover, we find that neither the Secretary of the Interior nor the Department is bound or estopped by such unauthorized acts.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1(2), the decision of the Commissioner, Indian Affairs, sustaining the decision of the Acting Superintendent, Anadarko Agency, dated Apr. 17, 1975, be and the same is

hereby **AFFIRMED** and the appeal **DISMISSED**.

This decision is final for the Department.

MITCHELL J. SABAGH,  
*Administrative Judge.*

WE CONCUR:

ALEXANDER H. WILSON,  
*Administrative Judge.*

WM. PHILIP HORTON,  
*Board Member.*

#### ESTATE OF HERMAN COANDO

5 IBIA 140

Decided June 22, 1976

Petition to Reopen.

#### GRANTED AND REMANDED.

#### 1. Indian Probate: Wills: Construction of—425.7

It is incumbent upon the Administrative Law Judge under existing regulations in testate cases to construe the provisions of a will.

**APPEARANCES:** Billings Field Solicitor, for Billings Area Director; Wind River Legal Services, Inc., for Tinnie N. Coando and children, Clayton, Virgil and Trudi Coando.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

INTERIOR BOARD OF  
INDIAN APPEALS

This matter comes before this Board on a Petition to Reopen filed

by John R. White, Acting Assistant Area Director, Billings, Montana, on Jan. 21, 1975. The Petition was not forwarded to this Board by Administrative Law Judge Garry Fisher until May 7, 1976, for the reason that the parties felt the matter could be resolved by means other than reopening the estate.

Briefly stated, the facts are as follows:

Herman Coando, hereinafter referred to as decedent, died on Jan. 8, 1971, without changing the Last Will and Testament he executed on Apr. 2, 1964.

At the time of the making of his will, the decedent owned an undivided five-twelfths interest in the allotment of Eunice Basil, Wind River No. 29, hereinafter referred to as WR-29, described as SW  $\frac{1}{4}$  SW  $\frac{1}{4}$ , Sec. 14, Township 1 South, Range 1 West and NW  $\frac{1}{4}$  NW  $\frac{1}{4}$ , Sec. 23, Township 1 South, Range 1 West, containing 80 acres. Only the foregoing described allotment is involved in the petition herein and any reference to any interest in an allotment refers to WR-29.

In paragraph SECOND of his will, the decedent devised WR-29, along with other allotments not involved herein, in the following language:

I give, devise, and bequeath to my children: Clayton Coando, U-5653, born 6-28-55; Virgil Randall Coando, U-09565, born 8-22-62; Trudi Ann Coando, U-09742, born 12-3-63; each an undivided  $\frac{1}{3}$  interest in all my inherited interests in the following allotments: \* \* \*.

On Nov. 8, 1967, Isaac Coando, also owner of a five-twelfths inter-

est in WR-29 conveyed his five-twelfths interest in the NW  $\frac{1}{4}$  NW  $\frac{1}{4}$ , Sec. 23, Township 1 South, Range 1 West to the decedent thereby increasing decedent's share therein to five-sixths. On Nov. 9, 1967, the decedent conveyed his five-twelfths interest in the SW  $\frac{1}{4}$  SW  $\frac{1}{4}$ , Sec. 14, Township 1 South, Range 1 West to Isaac Coando thereby increasing Isaac's share therein to five-sixths. Each grantor in the foregoing conveyances reserved all minerals including oil and gas.

Upon decedent's death, a hearing was held on July 6, 1971, for the purpose of ascertaining the heirs of law of decedent and inquiring into the facts and circumstances surrounding the making of his purported Last Will and Testament, dated Apr. 2, 1964. Thereafter, on Oct. 22, 1971, an Order Approving Will and Decree of Distribution was entered in the matter by Hearing Examiner William E. Hammett.

On page 2 of said Order, the Examiner ordered distribution of WR-29 and other allotments not involved herein, to Clayton, Virgil and Trudi Coando in the following language:

In equal undivided shares all of testator's inherited interest in the following allotments: \* \* \*.

On page 3 of the said Order, the Examiner ordered distribution to Isaac Coando, "The rest and residue of decedent's estate, real, personal and mixed."

In carrying out the Decree of Distribution, the Wind River Agency

interpreted the Examiner's order to mean that only five-twelfths of decedent's interest in the entire 80 acres of WR-29 passed under the Will to the three devisees hereinabove named and that the decedent's other five-twelfths interest in WR-29 received through the conveyance hereinabove described passed to the residuary devisee, Isaac Coando.

Apparently relying on the foregoing interpretation, Isaac Coando, on Aug. 7, 1974, conveyed the five-twelfths interest received through the decedent's Will in that part of WR-29, described as NW  $\frac{1}{4}$  NW  $\frac{1}{4}$ , Sec. 23, Township 1 South, Range 1 West, to decedent's widow, Tinnie Coando, for a consideration of \$3,729.16.

The grantee, Tinnie Coando, under the deed of Aug. 7, 1974, now apparently is claiming that her children, Clayton, Virgil and Trudi Coando received the decedent's five-sixths interest therein through the decedent's Last Will and Testament; so consequently, Isaac Coando had nothing to convey and it was due to the Wind River Agency's purported erroneous interpretation of the Examiner's Decree of Distribution that she purchased the five-twelfths interest in the NW  $\frac{1}{4}$  NW  $\frac{1}{4}$ , Sec. 23, Township 1 South, Range 1 West from Isaac Coando. Although it is not clear from the record, it would appear that she now is seeking to recover the consideration paid to Isaac Coando for the above-described tract.

A review of the record clearly indicates that the need for a compre-

hensive construction of the wording of paragraph SECOND of the decedent's Last Will and Testament and the Examiner's Decree of Distribution concerning the same so as to resolve the issue of whether or not Isaac Coando, as residual devisee of decedent's Will, took any part of WR-29 thereunder.

[1] 25 CFR 15.15 (1971) in effect at the time of the Examiner's order (now 43 CFR 4.240(2)) makes it incumbent upon the Administrative Law Judge to construe the provisions of wills. This apparently was overlooked by Hearing Examiner Hammett in his decision of Oct. 22, 1971. Accordingly, the estate should be reopened and the matter remanded to the Judge for construction of the disputed portion of the decedent's Will and for clarifying that part of the Examiner's Decree of Distribution concerning the same.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the estate herein is RE-OPENED and the matter is REMANDED to Administrative Law Judge William E. Hammett for the sole purpose of construing paragraph SECOND of the decedent's Last Will and Testament of Apr. 2, 1964, and clarifying that part of the Order Approving Will and Decree of Distribution concerning the distribution to the devisees thereunder and for the issuance of an order consistent therewith. The order as issued by the Judge shall be final

unless an appeal is taken to this Board within 60 days of the issuing date thereof.

This decision is final for the Department.

ALEXANDER H. WILSON,  
*Administrative Judge.*

I CONCUR:

WM. PHILIP HORTON,  
*Board Member.*

### ZEIGLER COAL COMPANY

6 IBMA 182

Decided *June 22, 1976*

Appeal by Zeigler Coal Company from a decision dated June 24, 1975, by Administrative Law Judge Paul Merlin upholding the validity of a withdrawal order issued pursuant to sec. 104(c)(2) and denying an Application for Review in Docket No. BARB 75-612.

Affirmed.

#### 1. Federal Coal Mine Health and Safety Act of 1969: Review of Notices and Orders: Generally

The validity of the precedent notice and order is not in issue in a proceeding for review of an Order of Withdrawal issued pursuant to sec. 104(c)(2) of the Act unless applications for review are filed within 30 days of the issuance of the precedent notice and order (43 CFR 4.530(c)).

#### 2. Federal Coal Mine Health and Safety Act of 1969: Withdrawal Orders: Generally

A sec. 104(c)(2) withdrawal order is properly issued where it is shown that

such order is based on a violation of a mandatory health or safety standard which is caused by the operator's unwarrantable failure to comply and no consideration need be given to whether the violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard (30 U.S.C. § 814(c)(2)).

APPEARANCES: J. Halbert Woods, Esq., for appellant, Zeigler Coal Company; Thomas A. Mascolino, Assistant Solicitor, and David L. Baskin, Trial Attorney, for appellee, Mining Enforcement and Safety Administration.

#### OPINION BY ADMINISTRATIVE JUDGE SCHELLENBERG

#### INTERIOR BOARD OF MINE OPERATIONS APPEALS

On Dec. 19, 1974, Withdrawal Order No. 1 CED was issued at Zeigler Coal Company's (Zeigler) No. 9 Mine in Madisonville, Kentucky. The order was issued pursuant to sec. 104(c)(2)<sup>1</sup> of the Federal Coal Mine Health and Safety Act of 1969 (Act)<sup>2</sup> and cited the following condition:

<sup>1</sup> Sec. 104(c)(2) of the Act (30 U.S.C. § 814(c)(2)) provides:

"If a withdrawal order with respect to any area in a mine has been issued pursuant to paragraph (1) of this subsection, a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) of this subsection until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) of this subsection shall again be applicable to that mine."

<sup>2</sup> 30 U.S.C. §§ 801-960 (1970).

The energized high voltage transmission cable was not covered, buried, or placed so as to afford protection against damage at three locations, for a distance of approximately 225 feet, in the main north supply-haulage entry; at approximately 12 locations, for a distance of approximately 300 feet, in the main east off main north supply-haulage entry; and was not guarded where men regularly work or pass under it at the entrance to the rock-dust hole in the main north; nor was it adequately guarded where men regularly work or pass under it in the main south off main east supply-haulage entry.

The regulation allegedly violated by the above condition is 30 CFR 75.807. It provides in its entirety:

All underground high-voltage transmission cables shall be installed only in regularly inspected air courses and haulageways, and shall be covered, buried, or placed so as to afford protection against damage, guarded where men regularly work or pass under them unless they are 6½ feet or more above the floor or rail, securely anchored, properly insulated, and guarded at ends, and covered, insulated, or placed to prevent contact with trolley wires and other low-voltage circuits.

On Jan. 6, 1975, Zeigler filed an Application for Review of the above withdrawal order as well as the underlying sec. 104(c)(1) order, 1 DNG, Sept. 11, 1974, and the antecedent notice, No. 1 DNG, Sept. 10, 1974. On Jan. 29, 1975, the Mining Enforcement and Safety Administration (MESA) filed a motion for partial dismissal of the Application for Review insofar as it sought review of the underlying sec. 104(c)(1) order and notice. By order dated Feb. 21, 1975, the Administrative Law Judge (Judge)

granted the motion for partial dismissal on the ground that the Application for Review of the sec. 104(c)(1) notice and sec. 104(c)(1) order was not timely filed.

At the hearing held on Apr. 16, 1975, in Arlington, Virginia, the Judge affirmed his order granting partial dismissal and testimony was limited to the sec. 104(c)(2) Order of Withdrawal No. 1 CED issued on Dec. 19, 1974.

The Judge found in his decision that the condition set forth in the order was undisputed and constituted a grave and unwarrantable violation of the cited standard in that:

a) at two locations unprotected cable was only 4½ feet off the floor;

b) the operator, having chosen to protect the cable by means of posts, and aware that MESA required the posts to be set on 5-foot centers, had failed to set the posts as required; and

c) that locations cited in the order were without protection because timbers had been knocked out or were missing, and that posts were often as far as 12 feet apart.

Accordingly, the Judge held that the order was properly issued.

#### *Contentions of the Parties*

Zeigler's first contention on appeal is that the underlying sec. 104(c)(1) notice and order should be reviewable in the instant proceeding. Zeigler concedes that its Application for Review was filed more than 30 days after the underlying notice and order were issued, but

argues that it adequately preserved its right to challenge these documents by contesting their validity in the instant Application for Review.

With respect to the withdrawal order here in dispute, Zeigler concedes that there were gaps in its system of protecting the cable, but alleges that nevertheless, placement of the cable against the rib afforded adequate protection. Zeigler also contends in effect that no violation existed because MESA's requirement to set posts for the protection of cable on 5-foot centers is not a mandatory safety standard.

MESA contends, citing *Eastern Associated Coal Corporation*, 3 IBMA 331, 81 I.D. 567, 1974-1975 OSHD par. 18,706 (1974), and *Kentland-Elkhorn Coal Corporation*, 4 IBMA 166, 82 I.D. 234, 1974-1975 OSHD par. 19,633 (1975), that an operator cannot use an Application for Review of a sec. 104(c)(2) order to contest a 104(c)(1) order issued more than 30 days prior to such application. MESA also contends that the Application for Review of the sec. 104(c)(2) order was properly denied.

### *Issues on Appeal*

A. Whether the validity of a sec. 104(c)(1) notice and order may be reviewed in a proceeding for review of an order of withdrawal issued pursuant to sec. 104(c)(2) of the Act filed more than 30 days after issuance of the 104(c)(1) order.

B. Whether the sec. 104(c)(2) Order of Withdrawal No. 1 CED, Dec. 19, 1974, was properly issued.

### *Discussion*

#### A.

[1] Prior to filing its Application for Review in the instant case, Zeigler has not challenged the validity of issuance or the truth of the allegations contained in the underlying notice or order. Since the validity of the underlying citations was not properly put in issue by timely challenge, Zeigler must be held to have waived review thereof and cannot be heard to the contrary in the instant proceeding to review a subsequent sec. 104(c)(2) order. See *Kentland-Elkhorn*, *supra*, and cases there cited.

#### B.

[2] In its decision of Apr. 13, 1976, the United States Court of Appeals for the District of Columbia Circuit<sup>3</sup> held that there is no gravity criterion required to be met before a sec. 104(c)(1) (30 U.S.C. § 814(c)(1))<sup>4</sup> withdrawal order

<sup>3</sup> *United Mine Workers of America v. Kleppe*, No. 75-1003.

<sup>4</sup> Section 104(c)(1) provides in relevant part:

"If, during the same inspection or any subsequent inspection of such mine within ninety days after the issuance of such notice, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsec. (d) of this sec., to be withdrawn

may properly issue, and "that *any* unwarranted violation of a mandatory health or safety standard is sufficient to justify issuance of a sec. 814(c)(1) withdrawal order" (p. 8 of slip opinion, *italics* original). The Court also stated that "Congress meant what it said in the second sentence [of sec. 104(c)(1)] and therefore nothing more may be implied into it" (p. 3 of slip opinion).

While the Court made no reference to sec. 104(c)(2), we are mindful of its rationale in our disposition of the instant case. Since the Court held that a substantial and significant contribution to the cause and effect of a mine safety or health hazard by the violation giving rise to a sec. 104(c)(1) withdrawal order is not a required criterion for the issuance of such order, and since sec. 104(c)(2) of the Act dictates that a withdrawal order shall issue upon a finding of violations similar to those that resulted in the issuance of the sec. 104(c)(1) order, it necessarily follows, and we so hold, that no consideration need be given to the substantial and significant contribution criterion of the violation giving rise to the 104(c)(2) withdrawal order in order to determine its validity. The holding is further supported by the fact that sec. 104(c)(2) of the Act does not specifically mention the substantial and significant criterion. We note that

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from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

this holding is contrary to our holding in *Eastern Associated Coal Corp.*, 3 IBMA 331 at 353 and 354, 81 I.D. 567 at 577, 1974-1975 OSHD par. 18,706 (1974), and insofar as it is contrary, the holding in *Eastern, supra*, is hereby overruled.

To be validly issued, however, a sec. 104(c)(2) order must still be based on a violation of a mandatory health or safety standard caused by an operator's unwarrantable failure to comply, *Eastern, supra*. The record in the instant case amply demonstrates the operator's indifference and lack of diligence with respect to the violation cited in Order of Withdrawal No. 1 CED, Dec. 19, 1974. Zeigler had chosen to protect the cable by means of posts and was aware that MESA required these posts set on 5-foot centers (Tr. 78-79). However, 225 feet of cable, unprotected by posts, was lying along the rib in the north supply haulage-way (Tr. 17-19). In two other locations unprotected cable was suspended 4½ rather than the minimum 6½ feet above the mine floor (Tr. 21-22). Zeigler's own witness conceded the existence of the conditions described in the order (Tr. 77-78), and admitted that a violation occurred in that the cable was not protected where the timbers were set too wide (Tr. 86). This witness also conceded that the operator had been repeatedly cited for violations of the same standard (Tr. 93).

While it is true that cable placed along the rib was formerly re-

garded by MESA as being adequately protected, MESA had changed its policy and the operator was aware of the change. Therefore, Zeigler's contention that no violation occurred because the cable lay against the rib is unpersuasive. Moreover, those instances where unprotected cable was suspended too low over the floor clearly present a violation of the mandatory standard and are not disputed in Zeigler's brief. We find that the alleged violation was proved and resulted from the operator's unwarrantable failure to comply. Accordingly, we conclude that the order in question meets the requirements for issuance without considering gravity and that the Judge's decision should be affirmed.

### ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), the decision in the above-captioned proceeding IS AFFIRMED.

HOWARD J. SCHELLENBERG, JR.,  
*Administrative Judge.*

I CONCUR:

DAVID DOANE,  
*Chief Administrative Judge.*

### AFFINITY MINING COMPANY (ON RECONSIDERATION)

6 IBMA 193

Decided *June 25, 1976*

Petition by the United Mine Workers of America for reconsideration of the

Board's decision in Appeal No. IBMA 75-68, affirming an order by Administrative Law Judge Richard C. Steffey dismissing an amended application for review of two modified notices of violation and of a notice of termination, all of which were issued under sec. 104(b) of the Federal Coal Mine Health and Safety Act of 1969.

Board decision, 5 IBMA 126, 82 I.D. 439, 1975-1976 OSHD par. 19,992 (1975) set aside. Order of dismissal below vacated and case remanded.

#### 1. Federal Coal Mine Health and Safety Act of 1969: Review of Notices and Orders: Dismissal of Applications

A representative of miners has a statutory and regulatory right to review of a notice of termination containing a finding of abatement as an incident to a timely filed application for review of a previous section 104(b) notice of violation in which such representative contends that such notice fixed a time for abatement that was unreasonable. 30 U.S.C. § 815 (1970), 43 CFR 4.1, 4.500, 4.530, 4.533.

#### 2. Federal Coal Mine Health and Safety Act of 1969: Review of Notices and Orders: Dismissal of Applications

An application for review of an original or modified sec. 104(b) notice of violation filed by a representative of miners does not become moot merely because MESA issues a notice of termination containing a finding of abatement. 30 U.S.C. § 815 (1970).

APPEARANCES: Steven B. Jacobson, Esq., for petitioner, United Mine Workers of America; James R. Kyper, for respondent, Affinity Mining Company; Thomas A. Mascolino, Esq., Assistant Solicitor, Lawrence W. Moon,

June 25, 1976

Esq., Trial Attorney, for respondent, Mining Enforcement and Safety Administration.

*OPINION BY CHIEF ADMINISTRATIVE JUDGE DOANE*

*INTERIOR BOARD OF MINE OPERATIONS APPEALS*

On May 15, 1975, Administrative Law Judge Steffey granted a pre-hearing motion by the Mining Enforcement and Safety Administration (MESA) in Docket No. HOPE 75-719 to dismiss an amended application by the United Mine Workers of America (UMWA) for review of two modifications of a notice of violation and the termination thereof issued under sec. 104(b) of the Federal Coal Mine Health and Safety Act of 1969. 30 U.S.C. § 814(b) (1970). The subject notices were all issued to Affinity Mining Company (Affinity) with regard to an alleged violation of 30 CFR 77.215, to wit, that a refuse pile at the Keystone No. 5 Mine was constructed so as to impede drainage and impound water. Originally, MESA required as part of abatement submission of design criteria for a diversion ditch but subsequently deleted such requirement in the first of the subject modified notices. The UMWA filed the subject application for review to challenge the deletion of this requirement, contending that without diversion ditch criteria MESA could not determine whether the cited violation had been abated and

that, therefore, the time fixed for abatement was unreasonable.<sup>1</sup>

Relying on our decisions in *Freeman Coal Mining Corp.*, 1 IBMA 1, 77 I.D. 149, 1971-1973 OSHD par. 15,367 (1970), and *Reliable Coal Corp.*, 1 IBMA 51, 78 I.D. 199, 1971-1973 OSHD par. 15,368 (1971), Judge Steffey granted dismissal, holding that a termination notice is not subject to review and that a challenge to a modification of a sec. 104(b) notice of violation is moot following the termination thereof.

By decision dated September 15, 1975, we affirmed. 5 IBMA 126, 82 I.D. 439, 1975-1976 OSHD par. 19,992 (1975).

Two days later, on Sept. 17, 1975, the UMWA petitioned for reconsideration. In the absence of objection, we granted the UMWA's petition. 43 CFR 4.21(c). The issues presented are: (1) whether the dicta in *Freeman Coal Mining Corp.*, *supra*, denying the reviewability of a termination of a section 104(b) notice of violation was properly confirmed in the circumstances of this case; and (2) whether we had correctly concluded that MESA's finding of abatement in the subject termination notice rendered the UMWA's claim for relief from the subject modification notices moot.

The detailed procedural and factual background of this proceed-

<sup>1</sup> Under 43 CFR 4.533, an original application for review of a sec. 104(b) notice is deemed amended to challenge subsequent notices issued thereunder.

ing through Sept. 15, 1975, is set forth in our decision of that date and need not be repeated here. In addition to granting reconsideration, we ordered oral argument which took place on Oct. 29, 1975, and accepted a late-filed brief from MESA.<sup>2</sup>

[1] Our starting point for analysis is the Board's early decision in *Freeman Coal Mining Corp.*, *supra*. In that case, the Board dealt with cross interlocutory appeals by MESA's organizational predecessor, the Bureau of Mines,<sup>3</sup> and Freeman Coal Mining Corp. (Freeman) from rulings in application for review proceedings brought by Freeman and the UMWA under sec. 105 of the Act, 30 U.S.C. § 815 (1970), to challenge modified notices of violation that had been issued pursuant to sec. 104(b), 30 U.S.C. § 814 (b) (1970). Of particular relevance here is the portion of *Freeman* wherein the Board overturned a ruling denying the Bureau's motion to dismiss which had been grounded on its finding of abatement. The Board set aside that ruling, holding

that in instances where the Bureau has made an unequivocal finding of abatement in a termination notice, any application for review of the underlying sec. 104(b) notice and subsequent modifications thereof is subject to dismissal. The Board also said that the finding of abatement in a termination notice is likewise not subject to review. Furthermore, despite the fact that the UMWA had not applied for review of a termination notice and was not an appellant, the Board in dicta clearly indicated that its conclusions were the governing rules of law, irrespective of whether the applicant for review is an operator or a representative of miners. 1 IBMA at 12.

In rationalizing its conclusions in *Freeman*, the Board pointed out that it could only exercise the authority delegated to it by the Secretary, and that insofar as sec. 104 (b) notices were concerned, the delegated review authority was no greater than that granted to the Secretary in sec. 105. 30 U.S.C. § 815 (1970). Noting that sec. 105 *expressly* provides for review of modifications or terminations of orders, but is silent on the reviewability of similar enforcement actions taken with respect to notices of violation, the Board apparently was of the opinion that the silence reflected an intent to bar review of notices of termination and to cut off review of a modified notice of violation once the subject violation had been abated. 1 IBMA 13, 14, n. 2.

Eight months after the *Freeman* decision was handed down, the

<sup>2</sup> In the initial stage of this appeal MESA elected not to file a reply brief. Subsequent to oral argument on reconsideration, MESA moved the Board to grant leave to file a brief so that it could address itself to matters raised at the argument. In the absence of objection, the Board granted the motion on November 11, 1975. After two extensions of time granted with the acquiescence of opposing counsel, MESA late-filed its brief on Jan. 5, 1976. However, in arguing its position, MESA went far beyond the matters raised at oral argument, and the UMWA moved to strike offending portions of MESA's brief. On Jan. 30, 1976, the Board, *inter alia*, denied the UMWA's motion but agreed to consider only those portions of MESA's brief pertaining to the issues on reconsideration.

<sup>3</sup> See 38 FR 18695 (July 10, 1973).

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Board issued its opinion in *Reliable Coal Corp.*, *supra*. There, the Board dealt with an appeal by an operator with respect to applications for review of sec. 104(b) notices which had been dismissed on the ground that the violations respectively cited therein had been abated. The Board affirmed, holding that although an operator may challenge the reasonableness of time to abate given in a sec. 104(b) notice on the ground that the inspector's finding of violation was erroneous, an application for review raising such an issue is subject to dismissal following abatement.

In explaining the result it reached in *Reliable*, the Board relied on the authority of *Freeman Coal Mining Corp.*, *supra*, but added to the underpinning for that decision without adverting to its original rationale therefor. The Board found significance in the portion of sec. 105 limiting review of sec. 104(b) notices to issues pertaining to the reasonableness of time to abate. Pointing out that an operator obviates a controversy over the reasonableness of time to abate by abating, the Board remarked: " \* \* \* In *Freeman*, it appeared that there was nothing left to be decided \* \* \*," a statement suggesting mootness. 1 IBMA at 58. Furthermore, the Board observed that in instances where, as in *Freeman*, an operator has challenged the reasonableness of time fixed for abatement on the theory that there never was a violation, dismissal of the application for review on the ground of abate-

ment does not preclude litigation of that question, but merely postpones its determination until such issue is joined in a civil penalty proceeding brought under sec. 109, 30 U.S.C. § 819 (1970). 1 IBMA at 59.

Although the Board did clarify some of the rulings in *Freeman*, no mention was necessary or made regarding the dictum portions of *Freeman* concerning the reviewability of termination notices or the rights of a representative of miners.

The conclusions that the Board reached in *Reliable* have been applied uniformly since that decision was issued. All these subsequent cases have resembled *Reliable* in that in each instance the applicant for review was an operator and the question for decision was whether the time fixed for abatement in a sec. 104(b) notice of violation was unreasonable because there was never any violation. Twice the soundness of the *Reliable* holding and the reasoning in support thereof have been challenged in a federal appeals court, and twice the Board has been upheld. *Reliable Coal Corp. v. Morton*, 478 F. 2d 257, 258, n. 1 (4th Cir. 1973), *Lucas Coal Company v. Interior Board of Mine Operations Appeals*, 522 F. 2d 581 (3d Cir. 1975).

To our knowledge, the instant case marks the first time in the six years since *Freeman* was decided that a representative of miners has seized the litigating initiative by filing an application for review of a sec. 104(b) notice. It thus presents the first occasion that the Board has

had to revisit the dicta in *Freeman* regarding reviewability of termination notices and to consider whether the holding and rationale of *Reliable Coal Corp.*, *supra*, is extensible beyond the peculiar facts of that case.

Turning first to the question of the reviewability of termination notices, we begin with the pertinent language of sec. 105(a)(1), 30 U.S.C. § 815(a)(1) (1970), which reads as follows:

\* \* \* An operator issued a notice pursuant to sec. 104(b) or (i) of this title, or any representative of miners in any mine affected by such notice, may, if he believes that the period of time fixed in such notice for the abatement of the violation is unreasonable, apply to the Secretary for review of the notice within thirty days of the receipt thereof. \* \* \*

The above-quoted clause refers generally to sec. 104(b) notices fixing a time for abatement, but does not differentiate between original and modified notices as such. Sec. 104(b) expressly provides for an original notice of violation and extension notices, but does not mention modifications which are authorized by sec. 104(g), 30 U.S.C. § 814(g) (1970).<sup>4</sup> Nevertheless, the Secretary has construed sec. 105 broadly so as to authorize review of modified notices apparently on the theory that such enforcement actions are, to paraphrase section 105,

notices issued "pursuant to sec. 104(b)," and do have an impact on time fixed for abatement. *See* 43 CFR 4.1, 4.500, 4.530 and 4.533.

Similarly, although neither section 105 nor section 104(b) mentions notices of termination, which are covered specifically by sec. 104(g), such notices are, in the broad sense, issued "pursuant to sec. 104(b)." However, unlike notices of modification, termination notices do not have an impact on the time fixed for abatement, and literally, sec. 105 provides only for review of sec. 104(b) notices which perform that function. MESA contends that the silence in sec. 105 as to the reviewability of such notices should be read as *generally* preclusive thereof.

Here, we need not determine whether a termination notice is *generally* reviewable upon application therefor by the representative of miners because on the facts of this record the narrow question for decision is whether there is any implied right in such representative to *incidental* review of a termination notice containing a finding of abatement when such representative has previously filed a timely application for review of the original sec. 104(b) notice as modified, contending that the time fixed for abatement is unreasonable due to an allegedly erroneous definition of abatement. We now answer this question in the affirmative because such incidental review of termination notices is essential for vindication of a previously filed meritorious claim for relief from an

<sup>4</sup> Sec. 104(g) provides as follows:

"Modification and termination of notice.  
"(g) A notice or order issued pursuant to this sec., except an order issued under subsection (h) of this sec., may be modified or terminated by an authorized representative of the Secretary."

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original or modified sec. 104(b) notice and because the Secretary himself has mandated such review. 43 CFR 4.1, 4.500(a)(6), 4.505(b), 4.530, 4.533.

We are of the opinion that the Congress must have contemplated that in the usual scenario, of which this case is an example, a termination notice containing an abatement finding was likely to be issued long before a decision could be made upon an application by a representative of miners for review of a previously issued sec. 104(b) notice setting forth the requirements for abatement. Indeed, the termination notice might well be issued long before the representative has received a copy of the original or modified notice. If we were to deem the legislative silence in section 105 regarding termination notices to bar incidental review thereof, we would as a necessary consequence be unable, in most instances, to provide, as Congress intended, an adequate administrative remedy to complement the right to review where the representative of the miners has filed a meritorious claim for relief with respect to a previous, related sec. 104(b) notice. Moreover, if we were to indulge MESA in such a restrictive reading of sec. 105, we would not only render the right to review virtually meaningless insofar as the representative of miners is concerned, we would as well be lending our assent to perpetuation of health and safety hazards where such representative can sustain its

claim for relief. To avoid such results, we deem it necessary to construe sec. 105 liberally so as to allow incidental review of termination notices in circumstances such as those here presented. And in so construing that section, we rely upon repeated administrative and judicial affirmations of the need to read the Act generously in accordance with common sense and with due regard for the remedial legislative objectives. *Compare, e.g., In the Matter of: Affinity Mining Company v. MESA*, 6 IBMA 100, 83 I.D. 108, 1975-1976 OSHD par. 20,651 (1976), with *Zeigler Coal Company v. Kleppe*, — F. 2d —, No. 75-1139 (D.C. Cir. Apr. 22, 1976).

Finally, even if we were disposed to confirm the dicta in *Freeman*, we would be precluded from doing so by the Secretary's procedural regulations. In providing for the jurisdiction of the Office of Hearings and Appeals, the Secretary made clear in comprehensive terms that review may be had of enforcement actions, even though in some instances the statute does not expressly so provide. 43 CFR 4.500(a)(6). *See Eastern Associated Coal Corp.*, 5 IBMA 74, 82 I.D. 392, 1975-1976 OSHD par. 19,921 (1975). And in listing the available causes of action with respect to notices, the Secretary expressly provided that the representative of miners could obtain incidental review of termination notices where review had been sought of a previous notice, as in the case at

hand. Compare 43 CFR 4.530 with 43 CFR 4.533.<sup>5</sup> Thus, in reading sec. 105 as broadly as we do today, we are adopting an interpretation which already has regulatory endorsement by the Secretary, and we are conforming to the Secretary's general policy in favor of a liberal construction of his procedural regulations and against insulating his enforcement agents from Secretarial review. 43 CFR 4.505(b). See *Eastern Associated Coal Corp.*, *supra*, 5 IBMA at 87-96, and *Republic Steel Corp.*, 5 IBMA 306, 328, 82 I.D. 607, 1975-1976 OSHD par. 20,233 (1975) (Doane, Chief Administrative Judge, concurring).

For all these reasons, we hold that the subject termination notice is reviewable in the circumstances of this case and we decline to confirm the dicta of *Freeman Coal Mining Corp.*, *supra*, to the extent that it is contrary to this decision.

[2] We come then to the remaining question on reconsideration which is whether we correctly affirmed the Administrative Law Judge's conclusion that the issuance of the subject termination notice rendered the original application for review in this case moot under our decision in *Reliable Coal Corp.*, *supra*. We now conclude that our original holding was in error and that the Administrative Law Judge overlooked critical distinguishing features which make *Reliable* completely inapposite.

<sup>5</sup> These two regulations were promulgated after *Freeman Coal Mining Corp.*, *supra*, was decided. See 36 FR 17339 (Aug. 28, 1971).

First, as we noted earlier, *Reliable* involved an operator who applied for review of a sec. 104(b) notice, contending that the time fixed for abatement was unreasonable because there never was a violation. *Reliable's* claim became moot because it elected to abate and thus obviated its claim for relief and removed the necessity for a judgment on the Board's part. In the case at hand, the action of the inspector in issuing a termination notice containing a finding of abatement in no way obviated the UMWA's original quarrel over the inspector's definition of abatement upon which such finding was based. Indeed, if anything, the termination notice extended and aggravated the controversy. Moreover, should it be ultimately decided that the UMWA is entitled to full relief, a matter as to which we intimate no views, an effective administrative remedy within the terms of sec. 105 (b) of the Act could be ordered. See 30 U.S.C. § 815(b) (1970).

Second, in *Reliable*, the Board merely imposed a delay rather than a bar to review because the issue there concerned the fact of violation, a matter subject to litigation in subsequent civil penalty proceedings brought under sec. 109 of the Act. 30 U.S.C. § 819 (1970). Here, even assuming *arguendo* that abatement obviated the subject amended claim for relief, the consequence of barring review on a mootness theory is that the issue raised by the UMWA which is bound to rise again is not likely ever to be resolved. Thus, this case, unlike *Reli-*

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able, presents the true situation of a short term administrative enforcement action capable of repetition, yet evading review if the claim for relief therefrom is adjudged to be moot. Cases involving such actions have long been held to be in a unique category which cannot be dismissed on the ground of mootness. See *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911), *Eastern Associated Coal Corp. v. Interior Board of Mine Operations Appeals*, 491 F. 2d 277, 278 (4th Cir. 1974), and *Freeman Coal Mining Co. v. Interior Board of Mine Operations Appeals*, 504 F. 2d 741, 743 (7th Cir. 1974). Cf. *Lucas Coal Company v. Interior Board of Mine Operations Appeals*, *supra* at 586-7.

Lastly, if one goes beyond the technical aspects of the mootness doctrine and considers the practical impact of dismissing in terms of the substantive remedial goals of the Act, it is readily apparent that the case at hand is significantly different from *Reliable Coal Corp.*, *supra*. As the Court of Appeals for the Third Circuit observed in *Lucas Coal*, the Board's *Reliable* interpretation encourages prompt abatement and facilitates expeditious review of more pressing cases. 522 F. 2d at 587. Assuming *arguendo* that the subject notices were erroneously issued, as we must, given the procedural posture of this appeal, affirmance of the order of dismissal below would produce no similarly felicitous results. Indeed such affirmance would be counterproductive because, as noted above, it would bar

abatement and perpetuate a hazard in this case, and it would establish an area of unreviewable enforcement discretion for the future fraught with danger to the physical well-being of the miners.

For all the foregoing reasons, we are of the opinion that the UMWA's claim for relief against the subject notices of modification is not moot and that the holding of *Reliable Coal Corp.*, *supra*, ought not to be extended to cases such as the one at bar.

### ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the initial decision of the Board in the above-captioned docket IS SET ASIDE, the order of dismissal below is VACATED, and the case IS REMANDED for further proceedings not inconsistent with the foregoing opinion.

DAVID DOANE,  
Chief Administrative Judge.

I CONCUR:

DAVID TORBETT,  
Alternate Administrative Judge.

### DISSENTING OPINION OF ADMINISTRATIVE JUDGE SCHELLENBERG

I would affirm the Board's decision of Sept. 15, 1975, for the reasons stated therein and for the following additional reasons:

1. The decision is inconsistent with and, in my opinion, overrules our previous holdings in *Freeman Coal Mining Corp.*, 1 IBMA 1, 77 I.D. 149, 1971-1973 OSHD par. 15,367 (1970), and *Reliable Coal Corp.* 1 IBMA 51, 78 I.D. 199, 1971-1973 OSHD par. 15,368 (1971), and the decisions of the U.S. Circuit Courts of Appeal in *Reliable Coal Corp. v. Morton*, 478 F. 2d 257 (4th Cir. 1973), and *Lucas Coal Company v. Interior Board of Mine Operations Appeals*, 522 F. 2d 581 (3d Cir. 1975).

2. I cannot find any justification for distinguishing between the right of an operator and the right of a representative of miners to seek review of a sec. 104(b) notice pursuant to sec 105(a) of the Act. The language is clear and unequivocal.

3. I find no statutory authority for review of "termination notices" nor do I find anywhere a Secretarial mandate for such review. The jurisdiction of this Board runs to review of notices fixing a time for abatement of violations of mandatory health or safety standards. 43 CFR 4.500(a)(1). I am not convinced that the language of the procedural rule in 43 CFR 4.530(a)—"*How initiated*. Proceedings for the review of \* \* \* a notice of violation, or a modification or termination thereof, \* \* \*" was intended to override either the statutory language of sec. 105 or the delegations to this Board in 43 CFR 4.500(a)(1). Furthermore, I find 43 CFR 4.530(c) inconsistent with 43 CFR 4.530(a) since, in the former, "ter-

mination" refers specifically only to an order as follows:

(c) *Time for Filing*. An application for review shall be filed within 30 days of receipt by the applicant of the order or notice sought to be reviewed or within 30 days of receipt of any modification or termination of an order where review is sought of the modification or termination. \* \* \* [Italics added.]

I would resolve any inconsistency or conflict in the procedural rules in favor of either the statutory language or the delegations from the Secretary. This apparent inconsistency should be resolved in just that manner.

4. Furthermore, the Act grants to the representative of miners a specific and exclusive right to relief in situations of this type. Sec. 103(g) reads, in part, as follows:

Whenever a representative of miners has reasonable grounds to believe that a violation of a mandatory health or safety standard exists, or an imminent danger exists, such representative *shall have a right* to obtain an immediate inspection \* \* \*. Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provisions of this title. [Italics added.]

I perceive no difference between an undetected (by MESA inspector) violation and a detected violation declared abated by MESA. If in fact the representative of miners has reasonable grounds to believe a violation exists its rights are protected by sec. 103(g).

5. To permit a challenge to a "termination notice," one in which MESA finds a violation abated, will frustrate the enforcement of

the Act and result in never-ending litigation for which this Board can grant no relief. We have declared on many occasions, commencing with *Freeman, supra*, that, "we do not understand the Secretary's delegation to the Board to confer upon the Board general supervisory authority over the entire spectrum of the Bureau's enforcement practices and policies." I consider this case to be an intrusion on MESA's enforcement practices and policies since the practical result of the majority opinion is to place the determination of abatement in the hands of the representative of miners and to invite such representative of miners to file for review of every notice of violation in order to protect its right of review of the termination notice.

I respectfully dissent.

HOWARD J. SCHELLENBERG, JR.,  
*Administrative Judge.*

#### PEGGS RUN COAL COMPANY, INC.

6 IBMA 212

Decided June 28, 1976

Appeal by Mining Enforcement and Safety Administration from that part of an initial decision by Administrative Law Judge Paul Merlin (Docket No. PITT 75-449-P) dated Oct. 1, 1975, assessing a civil penalty of \$75 for a violation pursuant to sec. 109 of the Federal Coal Mine Health and Safety Act of 1969.

Modified.

#### Federal Coal Mine Health and Safety Act of 1969: Penalties: Admissibility of Previous Violations

A violation for which a penalty is paid by an operator which is less than the amount originally assessed by MESA is admissible as evidence in considering an operator's history of previous violations. 30 U.S.C. § 819(a)(1) (1970).

**APPEARANCES:** Thomas A. Mascolino, Esq., Assistant Solicitor, David Barbour, Esq., Trial Attorney for appellant Mining Enforcement and Safety Administration; Ira P. Smades, Esq., for appellee, Peggs Run Coal Company, Inc.

#### OPINION BY ADMINISTRATIVE JUDGE SCHELLENBERG

#### INTERIOR BOARD OF MINE OPERATIONS APPEALS

The Board is asked to rule on that part of the decision of the Administrative Law Judge (Judge) in which, in assessing a penalty for the instant violation,<sup>1</sup> he excluded from the history of previous violations at the Peggs Run No. 2 Mine of Peggs

<sup>1</sup> MESA Inspector Dennis Swentosky issued Notice of Violation No. 2 DJS on Aug. 8, 1974, at Peggs Run No. 2 Mine located at Shippingport, Pennsylvania. It reads as follows:

"The 2 West section explosives and detonator magazines were being stored 8 feet and 17 feet respectively from the battery tractor haulage road."

The specific regulation violated is 30 CFR 75.1306 which requires that " \* \* \* supplies of explosives and detonators \* \* \* shall be \* \* \* located at least 25 feet from roadway \* \* \*." The fact that a violation thereof occurred is not in dispute.

Run Coal Company, Inc. (Peggs Run) any violation, the final payment for which was *less than* the assessment originally proposed by MESA. At the hearing a certified copy of a printout from the Office of Assessments was entered into evidence as Government Exhibit No. 5 showing, *inter alia*, the regulation violated, an original amount assessed therefor, and an amount paid by Peggs Run for each notice of violation.

The crux of the Judge's decision focuses on the Board's language in *The Valley Camp Coal Company*, 1 IBMA 196, 79 I.D. 625, 1971-1973 OSHD par. 15,385 (1972), which he construes in his opinion as follows:

\* \* \* The Board has held that cases in which some payment has been made pursuant to a compromise settlement cannot be considered in determining the history of previous violations *Valley Camp Coal Co.*, 1 IBMA 196, 204 (1972). \* \* \* [Dec. 3]

We find no support in *Valley Camp* for this interpretation and conclude that the Judge misconstrued our holding therein. This Board did not in *Valley Camp* and has not subsequently held that cases in which some payment has been made pursuant to a compromise settlement cannot be considered in determining the history of previous violations. *Valley Camp* dealt with the issue of whether a proposed order of assessment was an offer of compromise and the Board held that it was not. Nothing further can be read into it.

*Old Ben Coal Company*, 4 IBMA 198, 82 I.D. 264, 1974-1975 OSHD

par. 19,723 (1975), settled the issue respecting penalties paid by way of compromise or settlement. In *Old Ben* we held that violations for which proposed assessments have been paid by way of compromise or settlement were admissible as evidence in considering an operator's history of previous violations. 4 IBMA 198, 218. Any reasonable reading of this ruling must necessarily include in an operator's previous history violations for which the amounts paid by the operator are less than the amounts originally assessed by MESA. Therefore, we conclude that the Judge erred in eliminating from consideration those violations for which the penalty amounts paid were less than those amounts originally proposed by MESA.

In lieu of a remand, the Board may make the required findings of fact to coincide with the record evidence regarding any of the six criteria of sec. 109(a). *Buffalo Mining Company*, 2 IBMA 226, 230, 80 I.D. 630, 1973-1974 OSHD par. 16,618 (1973). Accordingly, taken into consideration those violations not included by the Judge in the history of previous violations at the Peggs Run No. 2 Mine, we modify the Judge's penalty assessment of \$75 for a violation of 30 CFR 75.1306 to reflect those violations and conclude that an appropriate penalty assessment is \$100.

## ORDER

WHEREFORE, pursuant to the authority delegated to the Board by

the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Judge's decision and order in Docket No. PITT 75-449-P IS MODIFIED by including in the considered history of previous violations at the Peggs Run No. 2 Mine all violations for which a penalty was paid by Peggs Run Coal Company, Inc., and by requiring that Peggs Run Coal Company, Inc., pay a civil penalty assessed in the amount of \$100 on or before 30 days from the date of this decision.

HOWARD J. SCHELLENBERG, JR.,  
*Administrative Judge.*

I CONCUR:

DAVID DOANE,  
*Chief Administrative Judge.*

JOHN T. STEWART, III,  
HARLAN C. ALTMAN, JR.  
(TRUSTEE)

25 IBLA 306

*Decided June 28, 1976*

Appeal from decision of the New Mexico State Office, Bureau of Land Management, canceling oil and gas lease NM-22172.

Set aside and remanded.

1. Oil and Gas Leases: Acreage Limitations—Oil and Gas Leases: Cancellation

An oil and gas lease issued for 2,960 acres in violation of administrative regulations need not be canceled in its entirety, in

the absence of an intervening qualified applicant.

APPEARANCES: C. M. Peterson, Esq., of Poulson, Odell & Peterson, Denver, Colorado, for appellant.

OPINION BY  
ADMINISTRATIVE  
JUDGE THOMPSON

INTERIOR BOARD OF LAND  
APPEALS

John T. Stewart, III, and Harlan C. Altman, Jr., Trustee, appeal from the decision of the New Mexico State Office, Bureau of Land Management (BLM), dated Sept. 16, 1975, canceling oil and gas lease NM-22172. The lease, effective July 1, 1975, was originally issued to Mr. Stewart. His assignment of the lease to Mr. Altman as Trustee of the Stewart Venture Trust was approved by BLM effective July 1, 1975.

BLM canceled the lease because it was issued in error for an area greater than the maximum acreage per lease of 2,560 acres allowed by 43 CFR 3110.1-3(a). BLM based its decision on 43 CFR 3111.1-1(e) (2) which allows approval of lease offers covering not more than 10 percent over the maximum allowable acreage, provided that the acreage is reduced. Lease offer NM-22172 stated that the total area was 2,320 acres and was approved as such. In fact, the land described in the offer and lease totals approximately 2,960 acres, an excess greater than the 10 percent curable defect.

Appellants argue that the BLM decision should be reversed for two reasons. First, they assert that the present lessee, Harlan C. Altman, Jr., Trustee, is a bona fide purchaser entitled to the protection of 30 U.S.C. § 184(h) (1970). Second, they argue that when a violation of regulations governing lease offers is discovered after the lease has issued, and no rights of third parties are involved, the equitable policy of the Department of the Interior allows the lease to stand.

The Secretary of the Interior is authorized by sec. 32 of the Mineral Leasing Act of 1920, 41 Stat. 450, 30 U.S.C. § 189 (1970), to promulgate rules and regulations to carry out the purposes of the Act. The Secretary has issued various regulations governing the content of oil and gas lease offers. Offers which are not filed in accordance with these regulations must be rejected. 43 CFR 3111.1-1(d). The question here is what action should the Department take when an oil and gas lease is erroneously issued on an offer which should have been rejected.

[1] The Department has developed a policy in some circumstances of not canceling oil and gas leases issued in violation of regulatory requirements, in the absence of intervening qualified applicants. *Claude C. Kennedy*, 12 IBLA 183 (1973). This policy has been applied to leases which do not comply with the limitations on total area and minimum acreage now set out at 43 CFR 3110.1-3(a). *Senemex, Inc.*, A-

29195 (June 10, 1963); *Arnold R. Gilbert*, 63 I.D. 328 (1956); *Earl W. Hamilton*, 61 I.D. 129 (1953). However, when a qualified applicant files a lease offer for the same land prior to the issuance of the defective lease, the Department will cancel the lease when it discovers the error. *Boesche v. Udall*, 373 U.S. 472 (1963); *Hugh E. Pipkin*, 71 I.D. 89 (1964); *R. S. Prows*, 66 I.D. 19 (1959); *Lynn Nelson*, 66 I.D. 14 (1959).

Oil and gas lease NM-22172 should not have been issued. The offer should have been rejected as provided by 43 CFR 3111.1-1(d). However, under the policy discussed above, it may not be necessary to cancel the lease in its entirety merely because the lease offer violated regulatory requirements. Therefore, we set aside the BLM State Office decision and remand the case for further consideration.

On remand, the BLM State Office should first examine its records to determine whether any qualified applicants filed oil and gas lease offers for the land in appellants' lease prior to June 12, 1974, the date lease NM-22172 was issued.<sup>1</sup> If there were such applicants, the BLM State Office should then consider whether appellant Altman qualifies as a bona fide purchaser pursuant to 30 U.S.C. § 184(h).

<sup>1</sup> Appellants have pointed out that two lease offers were filed on Sept. 10, 1975, for the land covered by their lease. Since these offers were filed subsequent to the issuance of appellants' lease, they were not filed by intervening applicants and do not constitute grounds to cancel NM-22172. *Arnold R. Gilbert, supra*; see *Stephen Dillon*, 66 I.D. 148 (1959).

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*Southwestern Petroleum Corp. v. Udall*, 361 F. 2d 650 (10th Cir. 1966).

In their statement of reasons, appellants have offered to relinquish from the lease the necessary acreage to bring it in compliance with 43 CFR 3110.1-3(a). No rental has been paid for the excess acreage (appellants tendered only enough back rental to cover 2,560 acres) and the actual acreage in the lease is more than the 10 percent allowed as a curable defect. Therefore, the State Office should require this relinquishment in the event there is no intervening qualified offeror.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case remanded for action consistent with this opinion.

JOAN B. THOMPSON,  
*Administrative Judge.*

WE CONCUR:

ANNE POINDEXTER LEWIS,  
*Administrative Judge.*

FREDERICK FISHMAN,  
*Administrative Judge.*

ROBERT L. BEERY, et al.

25 IBLA 287

Decided June 28, 1976

Appeal from decision of California State Office, Bureau of Land Management, rejecting patent application CA

3206 and declaring two mining claims null and void.

Affirmed.

1. Mining Claims: Generally—Mining Claims: Locatability of Mineral: Generally—Mining Claims: Specific Minerals Involved: Water

Water is not a mineral which is locatable under the general mining law.

2. Mining Claims: Generally

The bottling and distribution for sale of spring water for human consumption does not constitute the mining of a valuable mineral deposit under the general mining law.

3. Mining Claims: Withdrawn Lands—Withdrawals and Reservations: Effect of

Mining claims located on land withdrawn from all forms of entry are null and void from the beginning.

4. Withdrawals and Reservations: Springs and Waterholes

Even though springs and waterholes withdrawn from mineral entry by Executive Order No. 107 may not be in use, they nevertheless remain withdrawn so long as they provide sufficient water for public watering purposes.

APPEARANCES: Robert L. Beery, Esq., San Francisco, California, for appellants.

OPINION BY  
ADMINISTRATIVE  
JUDGE STUEBING

INTERIOR BOARD OF LAND  
APPEALS

Robert L. Beery and others appeal from the Nov. 10, 1975, decision

of the California State Office, Bureau of Land Management (BLM), rejecting their patent application (CA 3206) for two placer mining claims and declaring both claims to be null and void. The mining claims known as the Chemise Springs and South Chemise Springs placer mining claims, are situated in sec. 30 and 31, T. 5 S., R. 2 E., Humboldt Meridian, California. The California State Office rejected both claims for two reasons. First, the claims were located on land which was withdrawn from mineral entry. Second, the purported discovery is of "natural mineral spring water," a substance held to be not locatable by an earlier decision of this Department.

Appellants assert that the land was not actually withdrawn from mineral entry. Moreover, they argue, since mineral spring water is widely considered to be a mineral, it should be locatable under the general mining law, 30 U.S.C. § 21 *et seq.* (1970). Its value, they assert, lies in the fact that the spring water may be bottled and sold at a profit for human consumption.

[1] This Department long ago held that mineral spring water is not locatable under the general mining law. *Pagosa Springs*, 1 L.D. 562 (1882). In that case, Secretary Teller stated:

Many springs and many waters are impregnated with minerals held in solution; but it does not follow that the lands bearing such waters are mineral lands, and can be patented as such. Lands of a saline character are an exception, and are expressly provided for in the laws

relating to the disposition of the public lands. Lands containing mineral springs not of a saline character are subject to sale under the general laws, and not under the acts relating to the sale of mineral lands. [Citation omitted.]

In a second case arising only a year later, Secretary Teller stated:

Where it is evident that an application for a placer claim is in fact an attempt to secure a patent for a water right the application will be rejected.

*William A. Chessman*, 2 L.D. 774 (1883). While this case deals with water generally, instead of mineral spring water, specifically, the principle is still the same: water is not a mineral which is locatable under the general mining law, and an application for patent to a placer mining claim which is perceived to be an attempt to acquire a water right must be rejected.

Another case involving mineral water is *United States v. Springer*, 8 IBLA 123 (1972), *aff'd*, 491 F. 2d 239 (9th Cir. 1974), *cert. denied*, 419 U.S. 834 (1975). In that case there were mineral springs on 6 of the 10 mining claims involved. Some of the water was evaporated, leaving mineral salts which were then packaged and "hawked" through Dr. Springer's religious radio programs. Some of the water was also used for bathing purposes. Dr. Springer believed that the mineral salts and mineral water had medical benefits. While the locatability of the mineral water was not directly in issue in that case, it is clear that the Court of Appeals for the Ninth Circuit did not consider these activities to be mining within the meaning of the law. The

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opinion by the Court of Appeals noted that some of the mineral spring water was bottled and distributed gratis, and other water from the claimed springs was used for therapeutic baths. Although the water was not sold for a price, contributions were solicited.

In *United States v. Union Oil Co. of Calif.*, 369 F. Supp. 1289 (D. N.D. Cal. 1973), the Court held that a reservation of "coal and other minerals" to the United States on lands patented under the Stockraising Homestead Act did not include a reservation of geothermal steam and other geothermal resources, since they are not "minerals" within the meaning of the Act. The Court noted that the strong weight of authority is that water was not considered to be a mineral when the legislation was enacted in 1916. At 1297.<sup>1</sup>

The most recent reference by this Board to the locatability of mineral water appears in *United States v. Bienick*, 14 IBLA 290, 297 (1974), where, in a special concurrence, it was noted that among materials held to be not locatable was mineral spring water, citing *Pagosa Springs, supra*.<sup>2</sup>

<sup>1</sup> Appeal pending. However, even were the ruling in *Union Oil* reversed, it would not alter our conclusion in this case, as all minerals which may be included in a patent reservation are not necessarily locatable under the mining law. See discussion of non-locatable minerals, *infra*.

<sup>2</sup> The decisions in *United States v. Gray*, A-28710 (May 18, 1962); A-28710 Supp. (May 7, 1964); A-28710 (Supp. II) (Apr. 6, 1965), do not concern the locatability of mineral spring water. What was at stake were deposits of mineral salts which were used to make mineral water. The issue was not

If we are to pay more than lip service to the doctrine of stare decisis we must adhere to those cases, unless there is some compelling reason to the contrary. Appellants argue that because mineral spring water is widely considered to be a mineral, it should be locatable pursuant to sec. 1 of the Act of May 10, 1872, as amended, 30 U.S.C. § 22 (1970). That Act provides that all valuable mineral deposits in public domain lands are open to exploration and purchase. Appellants' argument is not persuasive for several reasons. First, whether water is considered a mineral generally depends on the context. Second, not all minerals are locatable under the general mining law. Third, even salt springs were never disposable under the Act of May 10, 1872. See *Solicitor's Opinion*, 49 L.D. 502 (1923). Fourth, Congress could not have intended for water to be locatable under the mining law.

In support of their argument that water is a mineral, appellants have cited a number of cases. The lead case is *United States v. Shurbet*, 347 F. 2d 103 (5th Cir. 1965). In that case, the Court of Appeals for the Fifth Circuit did say in dictum that water in the North Texas area is a mineral. *Ibid.* at 107. However, the issue in that case is whether water is a "natural deposit" within the meaning of section 611 of the 1954 Internal Revenue Code, 26 U.S.C.

whether the "manufactured" mineral water was locatable, but whether the mineral salts used in the manufacture were locatable. The claims were held invalid in that case.

§ 611 (1970). That section deals with cost depletion for mining. The court held that water in the "high plains" area of North Texas is such a deposit. That finding in no way turned on water being classified as a mineral. The only California case cited is *Cornwell v. Buck & Stoddard, Inc.*, 28 Cal. App. 2d 333, 82 P. 2d 516, 518 (2d Dist. Ct. App. Cal. 1938), where the court stated:

" \* \* \* Minerals are usually solids, the only ones which are liquids at ordinary temperatures being water and mercury."  
\* \* \*

As with the previous case, the statement was pure dictum. The issue was whether oil and gas drilling equipment, for tax purposes, should be considered mining equipment. Notwithstanding the dicta in some cases, there are cases construing deeds finding water to be a mineral; there are also many to the opposite effect. See, e.g., *Stephen Hays Estate, Inc. v. Togliatti*, 85 Utah 137, 38 P. 2d 1066 (1934), where a solution of copper and water was found not to be a mineral in a deed conveying all minerals in or on the land; *Vogel v. Cobb*, 193 Okla. 64, 141 P. 2d 276 (1943), where "other minerals" in a deed did not include water even though in a technical sense it may be thought of as a mineral; *Sun Oil Co. v. Whitaker*, 412 S.W. 2d 680, 684 (Tex. Civ. App. 1967), *aff'd*, 424 S.W. 2d 216 (Tex. 1968).

Even if water were held to be a mineral it does not necessarily follow that it is locatable under the general mining law. In *Northern*

*Pacific Ry. Co. v. Soderberg*, 188 U.S. 526, 530 (1903), the Supreme Court stated:

The word "mineral" is used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its significance in a given case. Thus the scientific division of all matter into the animal, vegetable or mineral kingdom would be absurd as applied to a grant of lands, since all lands belong to the mineral kingdom, and therefore could not be excepted from the grant without being destructive of it. \* \* \*

As was pointed out in the special concurrence in *United States v. Bienick*, *supra*, many minerals are not considered locatable, even though a profit might be made from their sale. Among these minerals are dirt, common clay, "fill" material, brick clay, peat, certain limestone and "blow sand." In discussing the reasons why these materials are not locatable, we apply Justice Holmes' statement that, "A page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

What is loosely referred to as the "General mining law" includes several different laws enacted within a decade of the Civil War. At the same time, this was also the period when the American West was being won by those ubiquitous heroes of contemporary legend and entertainment—cowboys, soldiers, and particularly, miners and homesteaders. At that time land was classified by the General Land Office as being either mineral land or agricultural land. Mineral land could be entered only under the mining laws; agri-

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cultural land could be entered only under the agricultural land laws, such as the homestead and desert land entry acts. Also during this period the Congress was awarding grants of non-mineral land to the states and to the railroads. If all those substances which are quite literally "minerals," such as common dirt, were locatable under the mining law, there could have been no entry under the homestead or other agricultural entry laws, nor any land grants to states and railroads, as all land would then have been "mineral land." This was the Department's point in *Holman v. State of Utah*, 41 L.D. 314, 315 (1912):

It is not the understanding of the Department that Congress has intended that lands shall be withdrawn or reserved from general disposition, or that title thereto may be acquired under the mining laws, merely because of the occurrence of clay or limestone in such land, even though some use may be made commercially of such materials. There are vast deposits of each of these materials underlying great portions of the arable land of this country. It might pay to use any particular portion of these deposits on account of a temporary local demand for lime or for brick. If, on account of such use or possibilities of use, lands containing them are to be classified as mineral, a very large portion of the public domain would, on this account, be excluded from homestead and other agricultural entry. It is safe to say that every kind of material found in land in its natural state may under some circumstances be put to non-agricultural uses. Local demand for building of levees or railroad embankments, filling up low places and the like, may make any particular land more valuable for the time

on account of the material it contains than on account of its agricultural possibilities, but it is clear that such considerations can not be given weight in determining what lands are reserved for special disposition because mineral in character. In one sense, all land except portions of the top soil is mineral. The term, however, in the public-land laws is properly confined to land containing materials such as metals, metalliferous ores, phosphates, nitrates, oils, etc., of unusual or exceptional value as compared with the great mass of the earth's substance. \* \* \*

Moreover, even though the need to have land available for homesteads may have diminished, there is a more compelling reason for continuing to hold that certain minerals are not locatable. To hold otherwise is to invite widespread abuse of the mining law. Sand and gravel provide an excellent example on this point. Prior to 1929 sand and gravel were not considered locatable under the general mining law. Several ostensible reasons were given for that holding in *Zimmerman v. Brunson*, 39 L.D. 310 (1910). Though not stated until 1933, the Department's real objection was the ease with which one could obtain a patent to public land for uses other than mining merely by asserting that the land was valuable for sand, gravel, or other minerals of widespread occurrence. *Solicitor's Opinion*, 54 I.D. 294, 296 (1933). Nevertheless, the Department ignored these fears which turned out to be all too prescient. Between 1929, when sand and gravel were first held to be locatable, and 1955, the abuse of the mining law by sand and

gravel claimants seeking title to public land for purposes other than mining became so offensive that the Congress, with the support of the mining industry, finally removed sand, gravel, and certain other common minerals of widespread occurrence from locatability under the mining law. Act of July 23, 1955, 30 U.S.C. §§ 611-615 (1970). Because of the widespread occurrence of water, the Department would be inviting a repeat of the abuses attending the locatability of sand and gravel, if it were to hold water locatable.

Even if these difficulties could be surmounted, it is nevertheless clear that Congress could not have intended that water be locatable. Through the enactment of three different provisions coetaneous with the enactment of the mining law, it is apparent that Congress intended that water should be severed from the public domain and acquired in accordance with the laws of the various western states. The first of the three provisions is sec. 9 of the Act of July 26, 1866, 30 U.S.C. § 51 (1970), part of the general mining law. Essentially, this provision recognized rights which had accrued under the appropriation system and provided for rights of way for ditches and canals. The recognition of rights under the appropriation system was approval of the severing of water from the public domain. The second provision dealing with water is sec. 17 of the Act of July 9, 1870, *as amended*, 30 U.S.C. § 52 (1970), also part of the general mining law. That Act provides that all

patents to public lands would henceforth be subject to the provisions of sec. 9 of the Act of July 26, 1866, 30 U.S.C. § 51 (1970). The third provision is sec. 1 of the Act of March 3, 1877, *as amended*, 43 U.S.C. § 321 (1970), part of the desert land entry laws. The Supreme Court discussed at length the effect of the three provisions in *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 154-56 (1935). It concluded with respect to the last provision:

As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. *Howell v. Johnson*, 89 Fed. 556, 558. The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that *all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named*. The words that the water of all sources of water supply upon the public lands and not navigable "shall remain and be held free for the appropriation and use of the public" are not susceptible of any other construction. The only exception made is that in favor of *existing* rights; and the only rule spoken of is that of *appropriation*. It is hard to see how a more definite intention to sever the land and water could be evinced. \*\*\* [Italics added.]  
295 U.S. at 162.

There is only one conclusion that can be drawn from the preceding statement. Because the usufructuary right to water was to be disposed of in accordance with *state* law, it could not at the same time be disposed of under the general mining law. Moreover, because two of the three statutory provisions severing the

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water from the land were enacted as part of the general mining law, it seems fairly clear that Congress had no intention of disposing of water under other provisions of the mining law.

Therefore, we adhere to previous decisions of this Department holding that water or mineral water is not a mineral which is locatable under the general mining law: *Pagasa Springs, supra*; *William A. Chessman, supra*; *United States v. Bienick, supra*.

[3] As previously noted, appellants also challenge the finding by the BLM that the land in question was and is withdrawn from entry under the mining law. The California State Office held in its decision:

By Executive Order No. 5237 of December 10, 1929 all of the unreserved public lands in T. 5 S., R. 2 E., H.M. were temporarily withdrawn for classification. Subsequently, the King Range National Conservation Area was established by Secretarial Order of September 21, 1974 under the Act of October 1, 1970 (84 Stat. 1067; 16 U.S.C. 460y) and Executive Order No. 5237 was revoked in accordance with Sec. 8 of the Act.

Therefore, at the time of the purported locations and amendments thereto of the Chemise Springs placer mining claim on September 27, 1970 and June 25, 1972; and the South Chemise Springs placer mining claim on September 26, 1970 and June 25, 1972 the land was effectively withdrawn from location by Public Water Reserve No. 107 and Executive Order No. 5237 and the claims are hereby declared null and void ab initio.

It is important to note at this point that both claims were located in 1970; amended location notices for

each claim were filed in 1972 and 1975. It is clear that E.O. No. 5237 was revoked by section 8 of the Act of Oct. 21, 1970, 16 U.S.C. § 460y-7 (Supp. IV 1974), as of the date of Secretarial Order establishing the King Range National Resource Area, Sept. 21, 1974. Any claim located prior to that time was null and void from the beginning, as mining claims may not be located on land closed to mineral entry. *John Boyd Parsons*, 22 IBLA 328 (1975); *Russ Journigan*, 16 IBLA 79 (1974); *Albert Gardini*, A-30958 (Oct. 16, 1968); *Leo J. Kottas*, 73 L.D. 123 (1966), *aff'd sub nom. Lutzenhisser v. Udall*, 432 F. 2d 328 (9th Cir. 1970). Therefore, only the 1975 location notices remain in issue, as the previous notices were of no effect.

[4] Appellants contend that Executive Order No. 107 of Apr. 17, 1926, 43 CFR 2311.0-3, 43 U.S.C. § 300 (1970), does not bar mining in this area. They contend that the order never applied to these lands because it was never noted on land office records. That argument is not persuasive as the withdrawal has been a matter of public record since its promulgation. *See, e.g., Instructions*, 51 L.D. 457 (1926); 43 CFR 292.1, 2, 3 (1938); 43 CFR 2321.1-1 (1969); 43 CFR 2311.0-3 (1976).<sup>3</sup>

<sup>3</sup> Actually, the withdrawal does not appear in land office records under the "Index to Miscellaneous Documents, Documents Applying to Lands Not Specifically Described on Which Conditions Restricting Disposal or Use May Exist."

See also the discussion of this point in *John V. Hyrup*, 15 IBLA 412, 415-16 (1974).<sup>4</sup>

Appellants argue in the alternative that the land is unlikely to be used for watering because the springs are either too small or too inaccessible to be used for watering purposes.<sup>5</sup> Appellants speak of a "modest" quantity of water and state that the flow is "totally insufficient" for the stated purpose of the withdrawal—stock watering. According to appellants' patent application, they plan to bottle 840 gallons of water per day. That amount is certainly sufficient for public watering purposes. The principal criterion for withdrawal is *whether* there is sufficient water for possible use. See *Frank Rauzi*, A-28602 (Aug. 15, 1962).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of

the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

EDWARD W. STUEBING,  
*Administrative Judge.*

WE CONCUR:

JOSEPH W. GOSS,  
*Administrative Judge.*

MARTIN RITVO,  
*Administrative Judge.*

### RUSHTON MINING COMPANY

6 IBMA 221

Decided June 29, 1976

Appeal by Rushton Mining Company from a decision by Administrative Law Judge Paul Merlin, dated Dec. 24, 1975, in Docket Nos. PITT 75-422-P, PITT 75-423-P, and PITT 75-428-P in which the Judge entered a default judgment against Rushton and assessed civil penalties in the amount of \$1,830 for 16 violations of the Federal Coal Mine Health and Safety Act of 1969.

Affirmed.

#### 1. Federal Coal Mine Health and Safety Act of 1969: Hearings: Pleading

The acceptance by the Administrative Law Judge of an answer to an order to show cause indicating the operator's desire for hearing and the subsequent issuance of a notice scheduling a hearing relieve the operator of the obligation to file an additional answer, and matters set

<sup>4</sup> Reversed on other grounds *sub nom. Hyrup v. Kleppe*, 406 F. Supp. 214 (1976), appeal pending.

<sup>5</sup> Although appellants assert that the waters from the subject springs are healthful, it is not clear whether the waters have any restorative powers. In the Statement of Reasons at 6, appellants describe the springs as "substantially mineralized." However, in that context it is noteworthy that "every smallest legal subdivision of the public land which \* \* \* contains a hot spring, or a spring the waters of which possess curative properties; and all land within one-quarter mile of every such spring located on unsurveyed land be \* \* \* withdrawn from settlement, location, sale, or entry, and reserved for lease \* \* \*." 43 CFR 2811.0-3(b).

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forth in the Petition for Assessment of Civil Penalty are deemed to have been generally denied by the operator.

## **2. Federal Coal Mine Health and Safety Act of 1969: Hearings: Abuse of Discretion**

An Administrative Law Judge does not abuse his discretion by entering a default against an operator for failure to appear at a scheduled hearing after waiting for 38 minutes, and where the operator offers no excuse on the day scheduled for hearing for its tardiness but on the next day explains to the judge that the delay was due to "unforeseen traffic conditions."

**APPEARANCES:** Richard M. Sharp, Esq., and Ira Smades, Esq., for appellant, Rushton Mining Company; Thomas A. Mascolino, Esq., Assistant Solicitor, and David Barbour, Esq., Trial Attorney, for appellee, Mining Enforcement and Safety Administration.

### *OPINION BY ADMINISTRATIVE JUDGE SCHELLENBERG*

#### *INTERIOR BOARD OF MINE OPERATIONS APPEALS*

In two of the dockets involved in this appeal, Docket Nos. PITT 75-422-P and PITT 75-423-P, Rushton Mining Company (Rushton) filed timely answers to Petitions for Assessment of Civil Penalty filed by Mining Enforcement and Safety Administration (MESA). In these answers, Rushton denied all of the allegations of violation in the Peti-

tions for Assessment and requested Pittsburgh, Pennsylvania, as the hearing site. In the case of the third docket, Docket No. PITT 75-428-P, Rushton failed to file an answer. Consequently, on August 20, 1975, an Order to Show Cause why Rushton should not be held in default was issued pursuant to 43 CFR 4.544(a). On Sept. 5, 1975, Rushton filed an answer to the Order to Show Cause and on Sept. 19, 1975, the Administrative Law Judge (Judge) issued a notice of hearing scheduling all three dockets for hearing in Pittsburgh, Pennsylvania, at 9 a.m. on Oct. 23, 1975. On the appointed day at Pittsburgh, at 9:38 a.m. the Judge called for appearances in all three dockets but Rushton failed to appear. Consequently, in accordance with 43 CFR 4.544(c), the Judge, ruling from the bench, held Rushton to be in default, directed the Solicitor to file proposed findings and conclusions, and returned to Washington, D.C.

On Dec. 1, 1975, following the filing of MESA's proposed findings and conclusions of law on Nov. 24, 1975, Rushton filed a Petition requesting that the default be stricken contending that counsel for Rushton "proceeded to Pittsburgh at the time set for hearing and because of unforeseen traffic conditions, was late for the hearing." Rushton further contended that Docket No. PITT 75-428-P was not in issue be-

cause Rushton never filed an answer to MESA's Petition.

On Dec. 24, 1975, the Judge issued his decision in which he denied Rushton's Petition and affirmed his finding of default. In denying Rushton's Petition, the Judge held that "unforeseen traffic conditions" was not a sufficient ground to justify tardiness. In ruling that Docket No. PITT 75-428-P was in issue, the Judge held that Rushton's response to the Order to Show Cause indicated its desire to contest MESA's allegations of violation and that the inclusion of this docket in the Notice of Hearing relieved Rushton of the duty to file an answer to MESA's Petition. Further, he held that Rushton knew the docket would be in issue because it failed to object to the Notice of Hearing and because of its admitted intent in the Dec. 1 Petition to appear at the hearing.

Based upon the proposed findings and conclusions submitted by MESA, the Judge assessed civil penalties in the amount of \$1,830 for 16 violations. Rushton filed a timely appeal and in its supporting brief made the same argument as to Docket No. PITT 75-428-P not being in issue as it did before the Judge. In its brief Rushton, for the first time, elucidated on the specific traffic conditions, supplemented by transcripts of television news reports, to justify tardiness of counsel. MESA, in its reply brief, stated that the Judge acted properly in holding that Docket No. PITT 75-428-P was in issue and in entering

the default judgment against Rushton. Additionally, MESA contends that the elucidation and supporting exhibits supplied by Rushton were not part of the record and should not be considered by the Board.

### *Issues Presented*

#### A.

Whether the Judge properly concluded that Docket No. PITT 75-428-P was in issue before him.

#### B.

Whether the Judge erred in entering a default judgment against Rushton.

### *Discussion*

#### A.

[1] The Board is of the opinion that Rushton's contention with respect to whether the contested docket was in issue is unpersuasive. According to 43 CFR 4.505(b), the rules governing the assessment of civil penalties under section 109 of the Act "shall be liberally construed to secure the just, prompt, and inexpensive determination of all proceedings consistent with adequate consideration of the issues involved." Although the Judge did not refer to this regulation in his decision, we believe that it supports his disposition of Rushton's argument. By including the contested docket in his notice of hearing the Judge removed any possible prejudice to Rushton. The allegations of prejudice contained in Rushton's

*June 29, 1976*

Dec. 1 Petition are unfounded in light of the 34-day period between the notice of hearing and the hearing. We are of the opinion that this period of time was sufficient for Rushton and its counsel to hold whatever discussions were necessary with respect to the alleged violations. Further, Rushton's contention that the preparation of an answer would have been wasteful if the Judge concluded that its response to the Order to Show Cause was unsatisfactory is unpersuasive. The Judge's inclusion of the docket in his notice of hearing was sufficient notice to the operator that its response was accepted in lieu of an answer. Accordingly, the Board concludes, as did the Judge, that Docket No. PITT 75-428-P was in issue in the instant case. Since Rushton's answers in the other two dockets were only general denials, we hold that the answer to the Order to Show Cause in the subject docket, together with the failure of Rushton to object to the notice scheduling a hearing on all these dockets, entitled the Judge to imply a general denial by Rushton with respect to the subject docket.

### B.

In his decision, the Judge apparently accepted Rushton's allegation that its failure to appear on time for the hearing was caused by "unforeseen traffic conditions," but held that such conditions were not an acceptable justification for tardiness. Although Rushton has attempted to

explain what constituted "unforeseen traffic conditions" in its brief on appeal, our review of the record reveals that counsel for Rushton at no time alleged that he was enmeshed in the traffic jam, that he was unable to contact the Judge prior to or soon after the hearing convened, or that he even attempted to contact the Judge in Pittsburgh on the day of the scheduled hearing. The Judge relates in his decision only that counsel for Rushton telephoned him at 3 p.m. the day after the scheduled hearing and explained the delay.

[2] The Board is of the opinion that the Judge's entry of a default judgment did not constitute an abuse of discretion. Based upon the facts that Pittsburgh was the city of Rushton's own choosing for the hearing, that both the Judge and counsel for MESA traveled to Pittsburgh at Government expense solely for the hearing requested by the operator, that Rushton made no attempt to communicate with the Judge while he was in Pittsburgh, and that Rushton has not alleged, let alone shown, that its counsel was involved in the traffic jam cited in its supporting exhibits, the Board concludes that Rushton's contentions, that the Judge's entry of default was an abuse of discretion, are unfounded. Accordingly, his decision will be affirmed.

### ORDER

WHEREFORE, pursuant to the authority delegated to the Board by

the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Judge's decision in the above-captioned case IS AFFIRMED and Rushton Mining Company IS ORDERED to pay civil penalties in the total amount of \$1,830 on or before 30 days from the date of this decision.

HOWARD J. SCHELLENBERG, JR.,  
*Administrative Judge.*

I CONCUR:

DAVID DOANE,  
*Chief Administrative Judge.*

### OLD BEN COAL COMPANY

6 IBMA 229

Decided *June 30, 1976*

Appeal by the Mining Enforcement and Safety Administration from a decision dated Aug. 5, 1975, by Administrative Law Judge Harvey C. Sweitzer, granting an Application for Review and vacating a sec. 104(c)(2) Order of Withdrawal in Docket No. VINC 73-268.

Reversed.

Federal Coal Mine Health and Safety Act of 1969: Withdrawal Orders: Generally

A sec. 104(c)(2) withdrawal order is properly issued where it is shown that such order is based on a violation of a mandatory health or safety standard which is caused by the operator's unwarrantable failure to comply and no consideration need be given to whether the violation was of such a nature as

could significantly and substantially contribute to the cause and effect of a mine safety or health hazard (30 U.S.C. § 814 (c) (2) (1970)).

**APPEARANCES:** Thomas A. Mascolino, Assistant Solicitor, and Michael V. Durkin, Trial Attorney, for appellant Mining Enforcement and Safety Administration; Robert A. Meyer, Esq., for appellee, Old Ben Coal Company.

### OPINION BY CHIEF ADMINISTRATIVE JUDGE DOANE

### INTERIOR BOARD OF MINE OPERATIONS APPEALS

On May 18, 1973, a sec. 104(c)(2) withdrawal order was issued in Old Ben Coal Company's (Old Ben's) No. 24 Mine in Franklin County, Illinois. It described a violation of 30 CFR 75.400<sup>1</sup> as follows:

Observed on 405-12 belt line on 8 south entry off 3 east accumulations of loose coal and coal dust of 4 to 12 inches deep along east side of belt line and under belt from 6 east to tail piece a distance of 1,270 feet, also float coal dust a distinct black in color over rock dusted surfaces in all east cross cuts adjacent to the belt entry from 6 east entry to tail piece or 1,270 feet. West side accumulations of loose coal and coal dust on mine floor 4 to 8 inches deep from 6 east entry to 635 foot mark or 945 feet.

A hearing was held pursuant to Old Ben's application for review,

<sup>1</sup> 30 CFR 75.400 provides:

"Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

on Apr. 9 and 10, 1974, in St. Louis, Missouri.

The Judge found from the evidence adduced at the hearing that the violation occurred, was the result of the operator's unwarrantable failure to comply,<sup>2</sup> but was not of such a nature as could significantly and substantially contribute to the cause and effect of a mine health or safety hazard. Finding the gravity criterion unsatisfied, the Judge granted the application for review and vacated the order.

The Mining Enforcement and Safety Administration (MESA) appealed the Judge's decision, contending that a significant and substantial contribution to the cause and effect of a mine health or safety hazard was presented by the violation and that therefore the order should have been upheld.

Since this appeal was filed, the United States Court of Appeals for the District of Columbia Circuit<sup>3</sup> held that there is no gravity criterion required to be met before a sec. 104(c)(1) (30 U.S.C. § 814(c)(1) (1970))<sup>4</sup> withdrawal order

may properly issue, and "that *any* unwarranted violation of a mandatory health or safety standard is sufficient to justify issuance of a sec. 814(c)(1) withdrawal order" (p. 8 of slip opinion, italics in original).

In consonance with the Court's decision, we recently held, in *Zeigler Coal Company*, 6 IBMA 182, 83 I.D. 232, 1975-1976 OSHD par. 20,818 (1976), that no consideration need be given to the gravity criterion of a violation giving rise to a sec. 104(c)(2) withdrawal order to determine its validity, since sec. 104(c)(2), like sec. 104(c)(1), does not specifically mention the significant and substantial criterion. We pointed out also, that while no gravity criterion is required to be met, a sec. 104(c)(2) order, to be properly issued, must still be based on a violation of a mandatory health or safety standard caused by an operator's unwarrantable failure to comply.

Inasmuch as the findings of violation and unwarrantability made below were not challenged on appeal, and since we now reject the sole basis for the Judge's decision to vacate, we must reverse.

<sup>2</sup> The finding of unwarrantability was based on facts indicating that the operator was aware of extensive accumulations of combustible material, yet failed to assign sufficient personnel so that a diligent cleanup effort could be made (Initial Decision p. 20, Tr. 101, 110).

<sup>3</sup> *United Mine Workers of America v. Kleppe*, — F.2d —, No. 75-1003 (D.C. Cir. Apr. 13, 1976).

<sup>4</sup> Section 104(c)(1) provides in relevant part:

"\* \* \* If, during the same inspection or any subsequent inspection of such mine within ninety days after the issuance of such notice, an authorized representative of the

Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

## ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), the decision in the above-captioned proceeding IS REVERSED, and the application for review IS DENIED.

DAVID DOANE,  
*Chief Administrative Judge.*

I CONCUR:

HOWARD J. SCHELLENBERG, JR.,  
*Administrative Judge.*

## OLD BEN COAL COMPANY

6 IBMA 234

Decided *June 30, 1976*

Appeal by the Mining Enforcement and Safety Administration and the United Mine Workers of America from a decision by Administrative Law Judge Robert W. Mesch vacating an order of withdrawal issued pursuant to section 104(c)(2) of the Federal Coal Mine Health and Safety Act of 1969.

Reversed.

1. Federal Coal Mine Health and Safety Act of 1969: Withdrawal Orders: Generally

A sec. 104(c)(2) withdrawal order is properly issued where it is shown that such order is based on a violation of a mandatory health or safety standard which is caused by the operator's unwarrantable failure to comply and no consideration need be given to whether the violation was of such a nature as could

significantly and substantially contribute to the cause and effect of a mine safety or health hazard (30 U.S.C. § 814(c)(2) (1970)).

APPEARANCES: Thomas A. Mascolino, Assistant Solicitor, and Robert A. Cohen, Trial Attorney, for appellant Mining Enforcement and Safety Administration; Stephen B. Jacobson, Esq., for appellant United Mine Workers of America; Robert A. Meyer, Esq., for appellee Old Ben Coal Company.

OPINION BY CHIEF  
ADMINISTRATIVE JUDGE  
DOANE

INTERIOR BOARD OF MINE  
OPERATIONS APPEALS

On Jan. 15, 1974, withdrawal order No. 1 HG was issued in Old Ben Coal Company's (Old Ben) No. 24 Mine located in Franklin County, Illinois. The order was issued pursuant to sec. 104(c)(2) of the Federal Coal Mine Health and Safety Act of 1969 (Act) <sup>1</sup> and recited the following conditions:

\* \* \* Accumulations of loose coal and coal dust 2 to 6 inches in depth were present in the roadways of the Nos. 1, 2 and 3 west bleeder entries off 61st north; accumulations were present along the floor close to the ribs a depth of 2 to 12 inches deep and 6 inches to 18 inches wide in the Nos. 1, 2 and 3 bleeder entries; in the No. 1 bleeder entry the accumulations were from the No. 1 side dump at 61st north belt to within 40 feet of the No. 1 working face, a distance of 200 feet; in the Nos. 2 and 3 bleeder entries the accumulations were from the 61st north belt to within 40 feet of the working faces, a distance of approximately 300

<sup>1</sup> 30 U.S.C. § 814(c)(2) (1970).

June 30, 1976

feet; also the same type of accumulations were in the crosscuts between Nos. 1, 2 and 3 bleeder entries, and little or no rock dust had been applied to the floor, roof, and ribs. There was coal float dust around the 61st north belt tail piece and beside the belt and adjoining crosscuts for 180 feet from belt tail piece toward the outside.

A hearing was held pursuant to Old Ben's application for review, on Sept. 9 and 10, 1974, in Benton, Illinois. In his decision, issued on Sept. 23, 1975, the Administrative Law Judge (Judge) concluded from the evidence that a violation occurred and was the result of the operator's unwarrantable failure to comply,<sup>2</sup> but was not of such a nature as could significantly and substantially contribute to the cause and effect of a mine health or safety hazard. Finding the gravity criterion unsatisfied, the Judge granted the application for review and vacated the order.

The Mining Enforcement and Safety Administration (MESA) and the United Mine Workers of America (UMWA) appealed the Judge's decision, contending that a significant and substantial contribution to the cause and effect of a mine health or safety hazard was presented by the violation and that therefore the order should have been upheld.

Since these appeals were filed, the United States Court of Appeals for

the District of Columbia Circuit<sup>3</sup> held that there is no gravity criterion required to be met before a section 104(c)(1) (30 U.S.C. § 814(c)(1) (1970))<sup>4</sup> withdrawal order may properly issue, and "that *any* unwarranted violation of a mandatory health or safety standard is sufficient to justify issuance of a section 814(c)(1) withdrawal order" (p. 8 of slip opinion, italics in original).

Subsequent to the Court's decision, the UMWA filed on Apr. 15, 1976, a motion to vacate the Judge's decision and remand the proceeding for further action.

In consonance with the Court's decision, we recently held, in *Zeigler Coal Company*, 6 IBMA 182, 83 I.D. 232, 1975-1976 OSHD par. 20, 818 (1976), that no consideration need be given to the gravity criterion of a violation giving rise to a sec. 104(c)(2) withdrawal order to determine its validity, since sec. 104(c)(2), like sec. 104(c)(1), does not specifically mention the

<sup>3</sup> *United Mine Workers of America v. Kleppe*, — F.2d —, No. 75-1003 (D.C. Cir., Apr. 13, 1976).

<sup>4</sup> Sec. 104(c)(1) provides in relevant part:

"\* \* \* 'If, during the same inspection or any subsequent inspection of such mine within ninety days after the issuance of such notice, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsec. (d) of this sec., to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.'"

<sup>2</sup> Initial decision, pp. 8 and 9. The finding of unwarrantability was based on facts indicating that the operator failed to diligently clean up extensive accumulations of combustible materials as described in the order of withdrawal.

significant and substantial criterion. We pointed out also, that while no gravity criterion is required to be met, a sec. 104(c) (2) order, to be properly issued, must still be based on a violation of a mandatory health or safety standard caused by an operator's unwarrantable failure to comply.

Inasmuch as the findings of violation and unwarrantability made below were not challenged on appeal, and since we now reject the sole basis for the Judge's decision to vacate, we must reverse. Under the circumstances the remand requested by UMWA is unnecessary.

### ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), the decision in the above-captioned proceeding IS REVERSED, the application for review IS DENIED, and the UMWA motion to vacate and remand IS DENIED.

DAVID DOANE,

*Chief Administrative Judge.*

I CONCUR:

HOWARD J. SCHELLENBERG, JR.,  
*Administrative Judge.*

ISLAND CREEK COAL COMPANY

6 IBMA 240

Decided *June 30, 1976*

Appeal by the Mining Enforcement and Safety Administration from a de-

cision by Administrative Law Judge Joseph B. Kennedy (Docket No. NORT 74-1007-P) assessing \$500 for one violation of the Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. §§ 801-960 (1970)).

Modified.

### Federal Coal Mine Health and Safety Act of 1969: Penalties: Amounts

An obvious roof control violation which could have been discovered and abated by the operator, and which results in a roof fall injuring a miner, warrants a sizable penalty appropriate to the circumstances and commensurate with the deterrent intent of the Act.

APPEARANCES: Thomas A. Mascolino, Assistant Solicitor, Robert J. Araujo, Trial Attorney, for appellant, Mining Enforcement and Safety Administration; William K. Bodell, II, Esq., for appellee, Island Creek Coal Company.

### OPINION BY ADMINISTRATIVE JUDGE SCHELLENBERG

### INTERIOR BOARD OF MINE OPERATIONS APPEALS

The subject of this appeal is the penalty assessment for a violation resulting in withdrawal order No. 1 JDT, issued on June 19, 1973, in Island Creek Coal Company's (Island Creek) Virginia Pocahontas No. 1 Mine in Oakwood, Buchanan County, Virginia. The order, issued under sec. 104(a) of the Federal Coal Mine Health and Safety Act

(Act),<sup>1</sup> cited the following condition:

A roof fall accident occurred in the No. 3 entry unit No. 6, on 4 South. This order is issued pending an investigation to determine the cause and to prevent a similar occurrence.

Clones E. Blankenship, a roof bolter, was injured by the roof fall. Mr. Blankenship had just arrived on the section where he and another miner were to take down a portion of the roof. As Mr. Blankenship released a telescoping jack used to erect and maintain line brattice, a rock about 7½ feet long, 4 feet wide and 3 inches thick fell on him and pinned him beneath it. Mr. Blankenship sustained vertebrae fractures and head lacerations.<sup>2</sup> He was hospitalized and remained absent from work 118 days (Tr. 232).

An investigation of the roof fall was made by Mining Enforcement and Safety Administration (MESA) inspectors Jimmie D. Toney and Dempsey R. Vass. In his termination of the withdrawal order, Inspector Toney wrote:

The investigation revealed that the cause of the accident was management's failure to have a required safety post set in the 5-foot-7-inch distance between the last safety post and the face. An additional safety post was installed in the No. 3 entry where required. The safety engineer explained the requirements of the roof control plan to the entire section crew including the section foreman.

On May 23, 1974, MESA filed a petition for assessment of civil pen-

alty charging Island Creek, *inter alia*, with a roof control violation<sup>3</sup> based on the condition described in the above order and termination thereof.<sup>4</sup> MESA suggested that a penalty of \$10,000 be assessed for the violation (Tr. 250).

A hearing was held on Nov. 4, 1975, in Charleston, West Virginia. At the conclusion of the hearing, the Administrative Law Judge (Judge) rendered an oral decision in which he found that a very serious violation of 30 CFR 75.200 had occurred, that the degree of the operator's culpability was slight negligence, and that the roof fall amounted "almost to an unavoidable accident" (Tr. 254-5). The finding with respect to negligence was based on evidence indicating that a roof bolter on the shift immediately prior to that in which the fall occurred had failed to set a safety post as required by the roof

<sup>3</sup> The roof control standard, 30 CFR 75.200, provides in part:

"Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs." \* \* \*

<sup>4</sup> We note that the order and termination describe a roof fall accident and the investigation thereof by representatives of the Secretary, rather than an imminent danger situation. In such circumstances sec. 103(f) of the Act is the proper vehicle for issuance of an order. However, in a penalty proceeding, the validity of the withdrawal order is not in issue and the conditions cited in such order, and proved as violations may be considered in combination in determining the gravity of the violations. *Zeigler Coal Company*, 2 IBMA 216, 80 I.D. 626, 1973-74 OSHD par. 16,608 (1973).

<sup>1</sup> 30 U.S.C. § 814(a) (1970).

<sup>2</sup> Exhibit GX-1, Report of Nonfatal Roof Fall Accident.

control plan. The Judge incorporated his oral findings into a written decision dated Nov. 5, 1975, wherein he stated: "\* \* \* the consequences of the violation, while very serious, resulted from circumstances of employee negligence not reasonably foreseeable or preventable by the operator that diminished the operator's responsibility to that of slight negligence."

MESA contends that the record amply demonstrates considerable negligence on the part of Island Creek. It requests, therefore, that a larger penalty be assessed to more properly reflect Island Creek's degree of negligence.

### ISSUE ON APPEAL

Whether the amount assessed as a civil penalty was appropriate under the circumstances and commensurate with the deterrent intent of the Act.

### FINDINGS OF FACT

Jimmie Toney, the MESA inspector, who issued the withdrawal order after the roof fall occurred on June 19, 1973, testified that the safety posts were not set on 5-foot centers as required by the roof control plan (Tr. 30, 65, 67-8). He opined that proper positioning of the posts would have helped to hold the rock (Tr. 67) and that the roof fell because posts were set on 5½- or 6-foot centers rather than 5-foot centers as required (Tr. 72, 76).<sup>5</sup>

<sup>5</sup> The following colloquy is recorded at Tr. 76:

"Judge Kennedy: Well, that post number two had it been on a five foot center from

The inspector described the roof in question as susceptible to sloughing because of the blasting that was being carried out to take down loose rock (Tr. 31), and stated that the mine had had "a lot of falls" (Tr. 40). On his inspection, Mr. Toney was accompanied by Mr. Arnold Vance, the operator's section foreman. Mr. Vance was not present to testify at the hearing. According to the inspector, Mr. Vance had made an onshift examination of the area where the roof fall occurred (Tr. 34).<sup>6</sup> The inspector stated that there had also been a preshift examination. The report of this examination (Exhibit RX-1), contains the notation: "No hazardous condition was found." The inspector felt that the operator should have known about the roof control violation by virtue of the preshift and onshift examinations (Tr. 91).

Mr. Dempsey R. Vass, the MESA inspector who worked with Mr. Toney in investigating the roof fall which injured Mr. Blankenship, also testified. He speculated that the accident could have been avoided if one more post had been set (Tr. 111-12). He described the roof as fragile, cracked and broken due to

the rib and the face would it have been under the rock that fell?

"The Witness: It would have. If it would have been five foot from the face and five foot from the rib it would have been directly under it just about."

<sup>6</sup> The following hearsay was elicited at Tr. 34:

"Q: Did Mr. Vance ever make any statement concerning whether or not the required timbers were installed?

"A. (By Mr. Toney) I heard him make a statement \* \* \*. He thought the post was behind the [brattice] and he felt like he was partly to blame for not checking."

shooting down of draw rock (Tr. 104). He said that the Virginia Pocahontas No. 1 Mine had had "numerous" roof falls and felt that in this instance carelessness was attributable to the preshift and onshift examiners who should have had another post set (Tr. 116-17).<sup>7</sup>

Harold Stanley, Director of Safety for Island Creek, testified that the preshift examiner's duties include making visual and sound and vibration checks of roof conditions (Tr. 144). He characterized the mine roof as fragile (Tr. 153) and stated that the section foreman was under a duty to see that the roof control plan was being strictly followed (Tr. 164).

Emory Wilson, Safety Engineer for Island Creek, also testified. He admitted the roof control violations (Tr. 173, 178-79), saying that the posts were improperly set by roof bolters on the previous shift (Tr. 173-74, 189). This witness too, testified that the section foreman was under a duty to make a thorough inspection and to see that the roof control plan was being strictly followed (Tr. 205).<sup>8</sup> Although at one

point he described the roof fall as an "unavoidable accident" (Tr. 192), Mr. Wilson testified that he himself was at fault because the spacing of safety posts was never measured (Tr. 175, 178, 183).

The injured roof bolter, Clones Blankenship, testified that the section foreman told him it was safe to go to work in the section where the accident occurred (Tr. 212). Mr. Blankenship said that he went into the section, visually inspected the roof, sounded it, and got no bad vibrations (Tr. 213, 216), but that he relied in some measure on the preshift and onshift examinations (Tr. 222). Mr. Blankenship gave the following account of the roof fall:

(Examination of Mr. Blankenship):

A. Well, to tell you the truth, I didn't notice how wide the timbers had been set. I didn't pay that much attention to them. But I did examine the top. But most of this rock that fell on me was behind the curtain and when I let that jack down, the edge of the rock caught me here on my back and I went under it.

Q. Okay. So it was behind the curtain? I don't understand.

A. Most of the width of it was behind the curtain and not visible from—

Q. Was the [jack] that you were moving was it holding the rock up?

A. Yeah. I believe it was. I believe that's what kept the rock from coming down earlier. Now, that's my belief (Tr. 215).

Mr. Blankenship agreed that the roof was fragile (Tr. 230-31) and stated that there had been an injury-causing roof fall in the Virginia

<sup>7</sup> In this connection, Mr. Vass gave the following testimony:

"\* \* \* Mr. Vance (the Section foreman) told me he thought the post was set on the other side of the curtain. And he knew there should have been another one in that second row but he didn't see it. But the curtain, he figured, maybe obscured his view \* \* \*" (Tr. 117).

<sup>8</sup> Testifying with respect to Mr. Vance's onshift inspection, Mr. Wilson said: "He [Vance] made a visual inspection of the place and made his tests and went on up to the curtain but he didn't go behind the curtain. But he made a good visual inspection and he thought he was in good shape, he said" (Tr. 191).

Pocahontas No. 1 Mine 3 days before he was hurt (Tr. 238-39).<sup>9</sup>

All five witnesses testified that they were aware of the fact that roof falls presented the greatest single hazard to underground coal miners (Tr. 36, 111, 153, 203, 232).

From the above evidence we make the following findings of fact:

1) A roof control violation occurred in the above-cited section of the Virginia Pocahontas No. 1 Mine in that a safety post was not set as required by the roof control plan.

2) A roof fall occurred in the section and seriously injured a miner.

3) A roof-bolting crew on a shift preceding that in which the roof fall occurred should have, but failed to set the required safety post.

4) Preshift and onshift examinations were made of the section but the absence of the required safety post was not discovered.

5) It was the responsibility of the individuals making the preshift and onshift examinations to discover and rectify hazardous conditions and strictly comply with the roof control plan.

6) The roof of the section where the roof fall occurred was fragile and subject to sloughing due to blasting activity carried out to remove loose rock.

7) The Virginia Pocahontas No. 1 Mine has had a number of roof falls; a recent injury-causing fall occurred several days or shifts prior to the roof fall that is the subject of this appeal.

## DISCUSSION

We believe that the facts of this case show a very serious violation as well as its grave consequences, and that the penalty assessed by the Judge was neither appropriate to the circumstances nor commensurate with the deterrent intent of the Act. The crucial evidence is that a roof control violation occurred, that a roof fall resulted, and that a miner might have been spared a debilitating injury, hospital stay and lengthy absence from work, if the roof control plan had been complied with. The fragile mine roof and a prior injury-causing roof fall, as well as the awareness of all witnesses that roof falls present the greatest single hazard to underground coal miners are all factors which exacerbate the gravity of the violation. While we agree that the record is replete with instances of negligent conduct and amply demonstrates operator negligence we do not deem it necessary, in light of our decision herein, to decide the degree of negligence for the purpose of assessing a penalty. Accordingly, in light of the gravity of the

<sup>9</sup> Mr. Vass testified that two men had suffered fractured backs "in a similar accident only two or three shifts prior \* \* \*" (Tr. 111).

June 30, 1976.

violation, and the negligence of the operator a higher penalty than that assessed by the Judge is warranted.

There being no showing that a civil penalty will be inappropriate to Island Creek's size or will adversely affect its ability to continue in business, we determine that a penalty of \$2,000 should be assessed for the above roof control violation, IN ADDITION to the \$500 assessed by the Judge and paid by Island Creek.

### ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision in the above-captioned case IS MODIFIED to the extent that a civil penalty in the total amount of \$2,500 is assessed for the violation of 30 CFR 75.200; and that Island Creek Coal Company pay the additional civil penalty assessed (\$2,000) within 30 days from the date of this decision.

HOWARD J. SCHELLENBERG, JR.,  
*Administrative Judge.*

I CONCUR:

DAVID DOANE,  
*Chief Administrative Judge.*

### RODNEY ROLFE AND RONALD J. ROLFE

25 IBLA 331

Decided June 30, 1976

Appeal from decision of the District Office, Bureau of Land Management, Prineville, Oregon, canceling grazing leases 3605752 and 36057583 (No. OR-05-76-3).

Set aside and remanded.

1. Administrative Practice—Grazing Leases: Cancellation or Reduction—Notice: Generally—Trespass: Generally

When the holder of a grazing lease is found to have violated regulations and the terms of his lease because his cattle have trespassed on Federal land, his lease may be canceled when lesser sanctions have proved to be of no effect or when the nature of the violation demands such severity. However, a decision canceling a lease will be set aside where the District Manager relied upon alleged trespasses of which the lessees had no notice and which occurred after a show cause notice had issued, and the case will be remanded for further proceedings.

2. Administrative Procedure: Hearings—Grazing Leases: Generally—Rules of Practice: Appeals: Hearings

The regulations do not provide for hearings as a matter of right on trespass violations involving a section 15 grazing lessee. For the Board of Land Appeals to exercise its discretion under 43 CFR 4.415

and order a hearing, the appellant must allege facts which, if proved, would entitle him to the relief sought.

**APPEARANCES:** Keith A. Mobley, Esq., Phipps, Dunn & Mobley, The Dalles, Oregon, for appellants.

*OPINION BY ADMINISTRATIVE JUDGE THOMPSON*

*INTERIOR BOARD OF  
LAND APPEALS*

Rodney Rolfe and Ronald J. Rolfe appeal from the decision of the District Manager, Prineville, Oregon, District Office, Bureau of Land Management (BLM), dated Nov. 4, 1975, canceling their grazing leases 3605752 and 36057583 (No. OR-05-76-3). Both leases were issued pursuant to sec. 15 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315m (1970): lease 3605752 to Rodney and Ronald Rolfe, effective Jan. 17, 1975, and expiring Mar. 31, 1978; lease 36057583 to Rodney J. Rolfe, effective June 10, 1975, and expiring Feb. 29, 1976. In his decision, the District Manager found the appellants to be in default for violating the terms and conditions of their grazing leases by repeatedly allowing their livestock to be on Federal land different from that designated in their leases.

The record shows that appellants have been cited for trespass of their cattle on Federal land six times:

once in June 1971 for 150 cattle; once in July 1972 for 6 cattle; twice in Sept. 1974 for 10 cattle each time; once in Nov. 1974 for 21 cattle; and once in July 1975 for 19 cattle. After notifying appellants of the July 1975 trespass, BLM issued a notice on Aug. 5, 1975, demanding that appellants show cause why their grazing leases should not be canceled for repeated and willful trespass violations. Appellants responded to the show cause notice by stating that the BLM grazing leases were essential to their cattle operation, that their cattle trespassed due to gates being left open and the poor fences in the area, and that they would not graze cattle in the "Water Gap area" until they built fences necessary to prevent trespass by their cattle.

The District Manager found appellants' arguments to be inadequate. He pointed out that the loss of the 77 AUMs authorized by appellants' grazing leases would only reduce the amount of feed and forage needed in appellants' cattle operation by approximately 4.6 percent per year. He dismissed the poor fences and open gates problem as failing to relieve appellants of the responsibility to prevent trespasses. Finally, the District Manager, while agreeing that fencing the Water Gap area could prevent further trespassing in the vicinity of the July 1975 violations, stated that this remedy would not relieve the prob-

*June 30, 1976*

lein in another area where appellants' cattle were observed trespassing in Sept. and Oct. 1975.<sup>1</sup>

In their statement of reasons, appellants deny any willful trespasses. They point out that the area in which their leases are located is poorly fenced and straying livestock are a constant problem. They describe the cooperative practice of the cattlemen in the area in dealing with this problem and submit affidavits to this effect. Finally, they argue that other solutions should be explored rather than canceling their leases.

The issue to be decided is whether appellants' grazing leases should be canceled. BLM has several options when considering what action to take against a grazing lessee whose livestock have trespassed on Federal land. Regulation 43 CFR 9239.3-1 (b) states:

A lessee who grazes livestock in violation of the terms and conditions of his lease by \* \* \* allowing the livestock to be on Federal land in an area \* \* \* different from that designated shall be in default and shall be subject to the provisions of § 4123.1 of this chapter. In

<sup>1</sup> BLM employees observed 10 of appellants' cattle trespassing on Federal land on September 24, 4 on Oct. 2 and 4 on Oct. 23. The District Manager stated in his decision that no trespass notices were issued because the administrative jurisdiction over the land at the time of the observations was uncertain. He further stated that the land was transferred to the National Park Service on Oct. 8 and that therefore the first two of these violations were considered in evaluating the case.

addition he may be subject to trespass action in accordance with the practices and procedures in §§ 9239.3-2(a), 9239.3-2(c) (1), (2), (3), (4), 9239.3-2(d),

and 9239.3-2(g) of this chapter \* \* \*.

In his decision, the District Manager stated that appellants' grazing leases were canceled in accordance with 43 CFR 4125.1-1(h), which sets forth the procedures for applying the provisions of 43 CFR 4123.1. Regulation 43 CFR 4123.1 states:

A grazing lease may be suspended, reduced, or revoked, or renewal thereof denied for a clearly established violation of the terms or conditions of the grazing lease \* \* \*.

The other regulations referred to in 43 CFR 9239.3-1(b) contain three additional actions which BLM may take against a lessee whose livestock are found to be trespassing. (These also apply to alleged trespassers who are not lessees. 43 CFR 9239.3-1(c)). BLM may assess damages at a certain rate for the value of the forage consumed by the trespassing livestock; the rate is doubled if the trespass grazing is deemed to be "clearly willful, grossly negligent, or repeated." 43 CFR 9239.3-2(c) (2). Second, BLM may impound the trespassing livestock in certain situations. 43 CFR 9239.3-2(c) (3). Third, any willful violation may be punished by a fine of not more than \$500. 43 CFR 9239.3-2(g).

[1] When the holder of a grazing lease is found to have violated regulations and the terms of his lease because his cattle have trespassed on Federal land, his lease may be canceled when lesser sanctions have proved to be of no effect or when the nature of the violation demands such severity. *See Coronado Development Corp.*, 19 IBLA 71 (1975); *cf. Eldon Brinkerhoff*, 24 IBLA 324, 335-37, 83 I.D. 185 (1976). Cancellation of a grazing lease may be the most effectual method BLM has to prevent future grazing trespasses by a lessee where trespasses have been repeated and willful and where there is little or no reason to believe that future trespasses may be prevented.

The record suggests that straying cattle have been an endemic problem in the area of appellants' leases for some time.<sup>2</sup> BLM has issued several notices of trespass to appellants, as described above, and to other ranchers in the area. However, prior to the July 1975 violation, BLM assessed appellants for damages only at the standard rate, not at the doubled rate authorized by regulation for repeated violations. BLM issued the grazing leases to appellants in 1975, after appellants had been cited for several trespass violations.

<sup>2</sup> The record contains a letter from the Wheeler County Sheriff to the National Park Service stating that Wheeler County has an open range law, i.e., an individual landowner must fence livestock out. The trespass violations all occurred in Wheeler County and one of the leases is located there.

The record also shows that in Aug. 1975, the District Office initiated efforts to control the problem of straying livestock referred to by appellants in their statement of reasons. Letters were sent to the ranchers in the area requesting their assistance in this effort. Authority to impound trespassing livestock was requested, and received, from the BLM Oregon State Director. At the same time, show cause notices were sent to lessees, including appellants, whose livestock had been found trespassing.

On appeal, appellants have submitted affidavits and other information concerning their own and area range practices in dealing with strays. They have also indicated their willingness to achieve a reasonable solution to prevent their cattle from straying, suggesting certain remedies, such as selling their cattle which now have a tendency to stray to certain areas and replacing them with new cattle. They make other statements in an attempt to mitigate the past trespasses.

We do not accept some of the excuses offered by appellants as mitigating factors. Despite local practices affecting private lands, unauthorized use of Federal lands by cattle, however they come upon the land, constitutes a trespass. *Cf. Eldon Brinkerhoff, supra.* It is the responsibility of a lessee to prevent his livestock from grazing on land different from that designated in his lease, and appellants' reasons do

not provide excuse for the repeated nature of their violations. *Cf. State Director for Utah v. Chynoweth Brothers*, 17 IBLA 113 (1974); *John Gribble*, 4 IBLA 134 (1971).

In canceling appellants' leases, the District Manager specifically found insufficient cause shown for not canceling the lease and also relied upon observations of cattle in trespass after issuance of the show cause notice. However, appellants were not given notice nor an opportunity to respond to these trespass violations occurring in Sept. and Oct. 1975 (*See* n. 1, *supra*), as required by 43 CFR 4125.1-1(h) and 9239.3-2(a) and (c). Therefore, they should not be considered in the proceedings under the Aug. 1975 show cause notice.

It is a close question whether the circumstances warrant having appellants' leases canceled. On the one hand, they have repeatedly trespassed over a period of years and were aware of some of the consequences of such trespasses. On the other hand, BLM assessed only minimum damages for the prior trespasses and issued the grazing leases subsequent to the violations. However, since the District Manager, in deciding to cancel the leases, relied upon alleged trespasses of which appellants had no notice and which occurred after the Aug. 5, 1975, show cause notice, the decision cannot stand. The Manager should have determined what sanctions to

employ without considering the later alleged trespasses, or delayed the imposition of penalties until notice and resolution of the later trespasses. Therefore, the decision must be set aside and the case remanded to the District Office for further proceedings consistent with this opinion.

We note that lease 36057583 expired Feb. 29, 1976; thus the question of cancellation of that lease has become moot. It is premature for us to comment on whether any renewal application should be granted.

[2] Appellants have also requested that a hearing before an Administrative Law Judge be held pursuant to 43 CFR 4.420 *et seq.* There is no provision in the regulations for hearings as a matter of right involving section 15 grazing leases, as contrasted with provisions relating to grazing privileges within grazing districts (*see* 43 CFR 4.470). This Board, in its discretion, may order fact finding hearings. 43 CFR 4.415. In view of the conclusion reached above, there is no reason for ordering a hearing. Furthermore, we point out that ordinarily to warrant our ordering such a hearing, an appellant must at least allege facts which, if proved, would entitle him to the relief sought. *Coronado Development Corp., supra*; *Ruth E. Han*, 13 IBLA 296, 304, 80 I.D. 698, 700 (1973). Although appellants "deny any trespass or trespasses that are being re-

lied upon by the District Manager as justification for lease cancellation," they allege no facts disputing the prior trespass violations for which they paid damages. They also admit that livestock grazing in the area do stray. Therefore, appellants' request would be denied in any event.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the deci-

sion appealed from is set aside and the case is remanded for further consideration consistent with this opinion.

JOAN B. THOMPSON,  
*Administrative Judge.*

WE CONCUR:

MARTIN RITVO,  
*Administrative Judge.*

ANNE POINDEXTER LEWIS,  
*Administrative Judge.*

○

June 1, 1976

J. P. HINDS, et al.\*

25 IBLA 67 Decided June 1, 1976

Appeal from decision of the California State Office, Bureau of Land Management, declaring mining claims null and void (CA-3305).

**Affirmed.**

**1. Mining Claims: Generally—Mining Claims: Lands Subject to—School Lands: Generally**

When title to an entire in-place school section has passed to the state, the United States no longer has a property interest therein and the land is no longer subject to location under the mining laws.

**2. Millsites: Generally—Mining Claims: Withdrawn Land—Withdrawals and Reservations: Reclamation Withdrawals**

Mining claims and millsites located upon land which has been previously withdrawn from entry under the mining laws by a first-form reclamation withdrawal are void ab initio. Because Departmental Order No. 2515 delegated authority to revoke such a withdrawal to the Bureau of Reclamation with the concurrence of the Bureau of Land Management, the land remains withdrawn from mining locations when the Bureau of Land Management does not concur with the recommendation of the Bureau of Reclamation to revoke the withdrawal and restore the land to entry.

**3. Mining Claims: Hearings—Mining Claims: Lands Subject to—Mining Claims: Withdrawn Land—Rules of Practice: Appeals: Hearings—Rules**

**of Practice: Hearings—Withdrawals and Reservations: Generally—Withdrawals and Reservations: Reclamation Withdrawals—Withdrawals and Reservations: Revocation and Restoration**

A request for a hearing pursuant to 43 CFR 4.415 for the purpose of taking testimony on the Bureau of Land Management's "continued refusal" to restore land in a reclamation withdrawal to entry will be denied. An appeal from a decision declaring mining claims and millsites null and void ab initio because the lands are in the withdrawal may not serve as the vehicle for petitioning the Secretary of the Interior to revoke the withdrawal. Furthermore, even if the withdrawal were revoked and the lands opened to entry, this action could not revive mining claims which were void when located while the withdrawal was in effect and the land closed to entry under the mining laws.

**APPEARANCES:** M. William Tilden, Esq., Lonergan, Jordan, Gresham, Varner & Savage, San Bernardino, California, for appellants.

**OPINION BY  
ADMINISTRATIVE JUDGE  
THOMPSON**

**INTERIOR BOARD OF LAND  
APPEALS**

J. P. Hinds, Ruth M. Hinds and Clara S. Gretschesel, individually and as Administratrix of the estate of F. A. Gretschesel, appeal from the decision dated Nov. 13, 1975, of the California State Office, Bureau of Land Management (BLM), declaring null and void numerous

\*Not in Chronological Order.

mining claims and millsites (CA-3305).<sup>1</sup> The mining claims are variously located in secs. 8, 16, 21, 22, 23, 26, 27, 34 and 35, T. 3 N., R. 26 E., S.B.M., California. The reasons given for the decision are that title to sec. 16, an in-place school section, passed to the State of California prior to the location of claims in that section and that the other sections were withdrawn from mineral entry for the Colorado River Reclamation Project prior to the location of any claim. The lands were withdrawn under the first form of withdrawal as provided in sec. 3 of the Act of June 17, 1902, 32 Stat. 388.

[1] Sec. 16 is an in-place school section. Title to this land presumptively passed to the State of California upon the date of survey, July 10, 1895. *Cf. Navajo Tribe of Indians v. State of Utah*, 12 IBLA 1, 80 I.D. 441 (1973). Where title has passed to a state under such a grant, the United States no longer has a property interest in the land, and it is not subject to location under the mining laws. *Cf. Russ Journigan*, 16 IBLA 79, 80 (1974). Appellants have not raised any question concerning the effectiveness of the grant to the state. Therefore, the decision concerning sec. 16 will be deemed correct.

<sup>1</sup> The mining claims and millsites located by appellants and involved in this appeal are listed in the appendix p. 278 to this decision. The statement of reasons purports to give reasons for an appeal from a decision dated Feb. 12, 1969. Otherwise, it refers to the matters which are the subject of this appeal, and we consider the reference as a harmless error in the absence of some other explanation.

[2] Appellants' contentions go to the status of the reclamation withdrawal on the other lands. They assert that the Bureau of Reclamation entered orders of revocation of the withdrawal for the lands in question in 1953 and 1954 and that BLM improperly failed to concur in the revocations. They argue that the failure of BLM to concur in the revocations of the withdrawal was contrary to law and an abuse of discretion. Therefore, they conclude, the withdrawal was unlawful, and the land was open to entry, at the time the mining claims and millsites were located in 1954-56 and 1970-74. (*See appendix, p. 278.*) We find no merit in appellants' argument and therefore affirm the decision of the State Office.

It is an established rule that mining claims and millsites located on land previously withdrawn from entry under the mining laws by a first-form reclamation withdrawal are null and void ab initio. *United States v. Guzman*, 18 IBLA 109, 116-17, 81 I.D. 685, 688 (1974); *Russ Journigan*, *supra* at 80; *Frank Zappia*, 10 IBLA 178, 183 (1973); *Ralph Page*, 8 IBLA 435, 437 (1972). Here, the withdrawal was effective June 4, 1930. The earliest mining claim location was on December 11, 1954. Therefore, unless the withdrawal has been revoked and the land restored to entry, all of the appellants' mining claims and millsites fall within the above rule and are null and void ab initio.

There has not been an order effectively revoking the withdrawal

June 1, 1976

and restoring the land to entry. The fact that the Bureau of Reclamation suggested revoking the withdrawal in 1953 and 1954 does not change the status of the land. In both revocation orders, the Bureau of Reclamation stated that they were made pursuant to the authority delegated by Departmental Order No. 2515 dated Apr. 7, 1949. In Departmental Order No. 2515, the Secretary of the Interior delegated the authority to revoke reclamation withdrawals to the Bureau of Reclamation "with the concurrence of the Bureau of Land Management." BLM has never concurred in the revocations of the withdrawal. The withdrawal here has not been effectively revoked, and the land restored to entry, during the more than 20-year period since appellants allege that the Bureau of Reclamation "saw no further justification for continued withdrawal of the land from public entry." The withdrawal was in effect when the earliest mining claim was located and when all subsequent mining claims and millsites were located, thus precluding such location regardless whether the Department was considering the revocation of the withdrawal. *Everett E. Wilder*, 15 IBLA 336, 342 (1974), citing *Donald E. Miller*, 2 IBLA 309, 314 (1971), *rev'd on other grounds*, *Miller v. United States*, Civ. No. C-70-2328 (N.D. Cal., July 5, 1973); cf. *Ralph J. Mellin*, 6 IBLA 193 (1972).

[3] Appellants request a hearing pursuant to 43 CFR 4.415 for the

purpose of taking testimony on BLM's "continued refusal" to restore the land to entry. This request is denied. *Hathern Lewis Stacy*, 23 IBLA 166, 168 (1975). If appellants wish to petition the Secretary of the Interior to have the withdrawal revoked and the land restored to entry they are at liberty to do so. This appeal, however, may not serve as the vehicle for making such a petition. Cf. *James Donoghue*, 24 IBLA 210, 215 (1976). Furthermore, even if such a petition were granted and the lands opened to entry under the mining laws, such action could not revive appellants' mining claims which were void when located while the withdrawal was in effect and the land was closed to entry under the mining laws. *United States v. Guzman*, *supra* at 117, 81 I.D. at 688; *Everett E. Wilder*, *supra* at 342; citing *Donald E. Miller*, *supra* at 314; *Frank Zappia*, *supra* at 183; *Ralph Page*, *supra* at 437; *David W. Harper*, 74 I.D. 141, 145 (1967).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

JOAN B. THOMPSON,  
*Administrative Judge.*

WE CONCUR:

MARTIN RITVO,  
*Administrative Judge.*

EDWARD W. STUEBING,  
*Administrative Judge.*

## APPENDIX

*List of Claims*

<u>Name of Claim</u>	<u>Date of Location</u>	<u>Date of Recording</u>	<u>Mining Book</u>	<u>Records Page</u>
Located by J. P. Hinds:				
Gold Crown No. 1	1/8/71	1/25/71	490	4
through				through
Gold Crown No. 7	"	"	490	10
Hope Mine No. 1	1/9/71	1/25/71	490	11
through				through
Hope Mine No. 8	"	"	490	18
Located by J. P. Hinds and Ruth M. Hinds:				
Blue Heaven No. 1	2/4/71	2/16/71	490	181
through				through
Blue Heaven No. 30	"	"	490	210
Blue Heaven No. 31	2/11/71	5/5/71	490	943
through				through
Blue Heaven No. 35	"	"	490	947
Blue Heaven Millsite	5/1/72	5/10/72	495	130
Blue Heaven Ext. No. 1	2/26/71	5/27/71	491	82
through				through
Blue Heaven Ext. No. 10	"	"	491	91
Blue Heaven Ext. No. 11	3/17/71	5/27/71	491	92
Blue Heaven Ext. No. 12	"	"	491	93
Blue Heaven Ext. No. 14	"	"	491	95
through				through
Blue Heaven Ext. No. 17	"	"	491	98
Bonus No. 1	9/10/71	11/19/71	493	653
Bonus No. 3	"	"	493	655
through				through
Bonus No. 11	"	"	493	663
Klondike No. 25	6/1/73	8/15/73	8247	806
Klondike No. 26	"	"	8247	807
Klondike No. 27	"	"	8247	808
Klondike No. 31	6/2/73	8/15/73	8247	812
Klondike No. 32	"	"	8247	813
Klondike No. 34	"	"	8247	815
through				through
Klondike No. 38	"	"	8247	819
Black Metal Millsite	5/7/72	7/10/72	7973	693

June 1, 1976

## APPENDIX

List of Claims

<u>Name of Claim</u>	<u>Date of Location</u>	<u>Date of Recording</u>	<u>Mining Book</u>	<u>Records Page</u>
Located by Ruth M. Hinds and F. A. Gretschei:				
Peacock Copper No. 1 through	1/27/71	2/2/71	490	56 through
Peacock Copper No. 6	"	"	490	61
Peacock Copper No. 9 through	1/28/71	"	490	64 through
Peacock Copper No. 16	"	"	490	71
Peacock Copper No. 18 through	"	"	490	73 through
Peacock Copper No. 21	"	"	490	76
Located by J. P. Hinds, Ruth M. Hinds and Clara S. Gretschei:				
Peacock Copper No. 22	3/7/74	5/20/74	8434	1110
Peacock Copper No. 23	"	"	8434	1111
Peacock Copper No. 24	"	"	8434	1112
Located by Clara S. Gretschei and F. A. Gretschei:				
Peacock No. 1 through	5/9/70	5/15/70	485	396 through
Peacock No. 14	"	"	485	409
Peacock Millsite	4/8/72	5/8/72	495	124
Lortie No. 1 Amended	5/28/70	6/3/70	485	677
Lortie No. 6 Amended	"	"	485	678
Lortie No. 7 Amended	"	"	485	679
Lortie No. 8 Amended	"	"	485	680
Ajax No. 1 Amended through	"	"	485	681 through
Ajax No. 6 Amended	"	"	485	686
Gold Crown Amended	"	"	485	687
Hope Mine Amended	"	"	485	688
Poor Daisy Amended	"	"	485	689
Ajax No. 7 through	5/30/70	6/9/70	485	769 through
Ajax No. 12	"	"	485	774

## APPENDIX

List of Claims

<u>Name of Claim</u>	<u>Date of Location</u>	<u>Date of Recording</u>	<u>Mining Book</u>	<u>Records Page</u>
Located by Clara S. Gretscher and F. A. Gretscher—Continued				
Ajax No. 13	"	8/4/70	486	325
Ajax No. 14	"	"	486	326
Lortie No. 9	6/3/70	6/9/70	485	775
through				through
Lortie No. 15	"	"	485	781
Located by Fred A. Gretscher:				
Louise	12/11/54	12/15/54	350	130
Poor Daisy	6/29/55	6/30/55	369	139
Hope Mine	"	"	369	141
The Lortie No. 1	"	"	369	143
The Lortie No. 2	"	"	369	145
The Lortie No. 3	"	"	369	137
Lortie No. 6	4/22/56	4/23/56	386	338
Lortie No. 7	"	"	386	334
Lortie No. 8	"	"	386	336
Ajax No. 1	12/11/54	12/15/54	350	124
Ajax No. 2	"	"	350	126
Ajax No. 3	"	"	350	128
Ajax No. 4	11/16/55	11/21/55	380	186
Ajax No. 5	"	"	380	187
Ajax No. 6	"	"	380	188

UNITED STATES v. ELODYMAE  
ZWANG

of the Administrative Law Judge granting contestees 160 acres of the 240 acres disputed in each entry.

UNITED STATES v. DARRELL  
ZWANG

26 IBLA 41

Recommended decision rejected; entries as contested canceled; joint appeal dismissed.

Decided July 9, 1976

Appeal from recommended decision of Administrative Law Judge Graydon Holt dismissing charges of contest complaints that contestees violated the acreage limitation in the Desert Land Act; joint appeal from decision

1. Administrative Procedure: Adjudication—Contests and Protests: Generally—Desert Land Entry: Generally—Res Judicata—Rules of Practice: Government Contests

A federal district court jury verdict in a suit to cancel desert land patents, that

July 9, 1976

the entrymen and their purchaser under an illegal executory contract did not commit fraud against the United States, does not collaterally estop this Department from adjudicating a contest grounded on the illegal executory contract against the purchaser's own entry; because the legal standard applicable in the subsequent contest is different than that in the fraud action—a desert land entry can be subject to cancellation for acts that do not constitute fraud.

## 2. Desert Land Entry: Generally—Words and Phrases

*"Hold by assignment or otherwise."* The purchaser of desert land under an illegal executory contract to convey the land subsequent to patent "holds" that land within the meaning of the acreage limitation of section 7 of the Desert Land Act, as amended, 43 U.S.C. § 329 (1970).

## 3. Community Property—Desert Land Entry: Generally

Rights under an executory contract to acquire property entered into by the husband alone are presumed to be community property under California law, and a conveyance as community property to husband and wife in settlement of litigation regarding the contract corroborates the presumption; both spouses stand on equal footing with respect to charges, based on the executory contract, of violating the acreage limitations in section 7 of the Desert Land Act, 43 U.S.C. § 329 (1970).

## 4. Desert Land Entry: Cancellation—Rules of Practice: Government Contests

In the case of a desert land entry contestee who violates the 320-acre limitation on holding desert land because he is the "purchaser" are subject to cancellations under an illegal executory contract to convey after patent, all entries held by the "purchaser" are subject to cancellation, and the Department may proceed by

way of contest against the "purchaser's" own entry, which was not a subject of the illegal contract.

## 5. Desert Land Entry: Cancellation—Desert Land Entry: Final Proof

The doctrine of voluntary rescission—which allows an entryman, who was, although in good faith, party to a contract that violated the desert land law, to proceed to the merits of his proof upon repudiation of the contract—will not be applied when: (1) repudiation of the contract was not truly voluntary; (2) the rescission occurred long after the entries' lives expired; (3) the illegal contract involved a complex of four entries; and (4) no other mitigating circumstances are present.

**APPEARANCES:** Milton N. Nathanson, Esq., Field Solicitor, Riverside, California, for contestant-appellant; Ted R. Frame, Esq., of Frame & Courtney, Coalinga, California, for contestees-respondents.

## OPINION BY ADMINISTRATIVE JUDGE FISHMAN

### INTERIOR BOARD OF LAND APPEALS

On Jan. 6, 1955, the predecessors and assignors to Elodymae and Darrell Zwang entered land in sec 19, T. 4 S., R. 16 E., S.B.M., California, under the provisions of the Desert Land Act, as amended, 43 U.S.C. § 321 *et seq.* (1970).<sup>1</sup> The entries

<sup>1</sup> Elodymae Zwang's entry R(LA)-096387 embraced lots 1 and 2 of the SW¼, and the SE¼, sec. 19, T. 4 S., R. 16 E., S.B.M., California, containing 320 acres. Darrell Zwang's entry R(LA)-096388 embraced lots 1 and 2 of

were suspended, and then extended, and the Zwangs filed final proof May 17, 1961. After an initial remand to the land office by the Bureau of Land Management's Division of Appeals, the Bureau held that the Zwangs' proof demonstrated a well with the capacity to irrigate only 80 of the 320 acres in each entry. On the Zwangs' appeal, the Assistant Solicitor for Land Appeals set aside the Bureau's decision and remanded the case. He held that the Zwangs' assertions that their wells could adequately irrigate more than 160 acres created an issue of fact that required notice and a hearing under the Department's contest procedures. *Elodymae Zwang*, A-30201 (Feb. 3, 1965).

The Bureau filed contest complaints on Feb. 14, 1969,<sup>2</sup> against

the NW¼, and the NE¼, sec. 19 of the same township.

The Los Angeles Land Office approved the assignment of R(LA)-096388 from Pat H. Baker to Darrell Zwang, and the assignment of R(LA)-096387 from Willard E. Baker to Elodymae Zwang, by decisions dated Dec. 22, 1958.

<sup>2</sup>The Zwangs had in the meantime demanded issuance of patents for the entries under sec. 7 of the Act of March 3, 1891, as amended, 43 U.S.C. § 1165 (1970), which provides, " \* \* \* after the lapse of two years from the date of the issuance of the receipt [on final proof] \* \* \*, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered \* \* \*." The Bureau had rejected the demand by letter Mar. 5, 1965, on the ground that the original land office decision rejecting the final proof within 2 years of the issuance of receipt, and the subsequent appeals on the rejection, had tolled the running of the 2-year period.

The Zwangs' suit for a writ of mandamus compelling issuance of patents for the full acreage in each entry was dismissed, and that dismissal affirmed in *Zwang v. Udall*, 371 F.2d 634 (9th Cir. 1967).

240 acres of each entry, i.e., not including the 80 acres in each entry approved in the Bureau's earlier decision. The complaints charged:

- a) The water supply developed for the entry is insufficient for the irrigation of all the irrigable land embraced therein.
- b) An irrigation system adequate to irrigate all of the irrigable land embraced in the entry has not been constructed.

In late 1969, after the contests had been set for hearing, the Acting Regional Solicitor moved that the Departmental Hearing Examiner<sup>3</sup> stay the hearing until the Department completed an investigation into the possibility that the Zwangs had, by virtue of contracts entered into in 1961, violated the provisions of the Desert Land Act limiting to 320 acres the amount of land any one person could hold under the Act. 43 U.S.C. § 329 (1970).

The Hearing Examiner, citing the Department's authority to initiate contest at any time prior to patent, denied the postponement motion and offered to hold the record open for a reasonable time to allow amendment of the complaints. After a 3-day hearing, the Hearing Examiner issued a decision on Jan. 7, 1971, dismissing the contests in part and rejecting the patent applications in part. He rejected the applications for the E½ E½ of the section, holding that the NE¼ NE¼ of the sec. could not be irrigated with the existing ditch system, and that "while it might be

<sup>3</sup>The title "Hearing Examiner" has since been changed to "Administrative Law Judge" by order of the Civil Service Commission. 37 FR 16787 (Aug. 19, 1972).

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theoretically possible to use [the SE $\frac{1}{4}$  NE $\frac{1}{4}$  and the E $\frac{1}{2}$  SE $\frac{1}{4}$ ], they will not be irrigated and utilized in a farming operation." Dec. I, at 8.

The Hearing Examiner dismissed the complaints against Lot 1 of the NW $\frac{1}{4}$  and Lot 1 of the SW $\frac{1}{4}$  of the section based on contestant's agricultural expert's crop plan. Dec. I, at 5 n. 1. He then adopted the irrigation ditch water loss figures of contestees' witnesses, recomputed the irrigable acreage on that basis, and dismissed the complaints against the W $\frac{1}{2}$  E $\frac{1}{2}$  of the sec. Dec. I, at 6. Both parties appealed the decision.

Subsequent to the hearing the United States moved to amend contest complaint R(LA)-096388 against Darrell Zwang to add a third charge: that by entering into an agreement with Joseph and Bernadine Lyttle in 1961 to purchase their desert land entries after patent, Darrell Zwang violated sec. 7 of the Desert Land Act, *as amended*, 43 U.S.C. § 329 (1970), by holding more than 320 acres of desert land within the meaning of the Act. The Hearing Examiner deferred ruling on the issue at the parties' request pending the outcome of *Reed v. Morton*, 480 F.2d 634 (9th Cir.), *cert. denied*, 414 U.S. 1064 (1973).

By order of June 28, 1973, this Board remanded both cases for hearing on the issue of whether the contestees had violated sec. 329 under the standards set out in *Reed v. Morton*, *supra*. Contestant then

moved to amend the contest complaint in R(LA)-096387 to charge Elodymae Zwang with the same violation of sec. 329. The amended complaints, directed against both Zwangs, specifically charged that contestees came to hold more than 320 acres of desert land by the settlement in *Lyttle v. Zwang*, Civil No. 94079 (Riverside County Superior Court), in which Mrs. Lyttle conveyed land to the Zwangs by grant deed as community property, and by "other activities."

Contestant's motion to amend the complaints was granted over contestees' objection that the motion was untimely, and a hearing was held. In his decision, the Administrative Law Judge ruled that no violation of the statute occurred and dismissed this article of the complaints. Contestant has appealed this ruling.

We treat this issue first, as its resolution could moot the issues on the joint appeal of the original hearing decision. Sec. 7 of the Act of March 3, 1877, *as amended*, 43 U.S.C. § 329 (1970), provides in relevant part, "no person \* \* \* shall hold by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or dessert lands \* \* \*."

The Administrative Law Judge made the following findings of fact on this issue. In 1961 Darrell Zwang contracted to buy the 640 acres embraced in the adjoining desert land entries of Joseph and Bernadine

Lyttle after patents issued to the Lyttles (Ex. 19, Attachment A). Zwang spent about \$85,000 perfecting the Lyttles' entries. After patents issued, Mrs. Lyttle (Mr. Lyttle having died) resisted a request to convey the land by filing a quiet title action against Darrell Zwang. The California Court of Appeals had held such a contract unenforceable in *Griffis v. Squire*, 267 Cal. App. 2d 461, 73 Cal. Rptr. 154 (1968), but granted the improver-purchaser a lien on the property for the amount expended on permanent improvements, taxes and insurance. Dec. II, at 1-2.

The Lyttle-Zwang quiet title case was settled and the debt and lien were satisfied by Mrs. Lyttle's conveyance of half of the patented acreage to the Zwangs on Dec. 16, 1969 (Ex. 24). Knowledge of these facts led the United States to sue to cancel the Lyttles' patents (Ex. X-9). A Federal District Court jury held that no fraud was committed and that the patents should not be canceled. *United States v. Lyttle, et al.*, Civil No. 70-1522-F (C.D. Cal. Dec. 14, 1972).

After making the above findings, the Administrative Law Judge held (Dec. II, at 2):

The question now before this administrative body is in effect whether there was fraud by the Zwangs in acquiring 320 acres of the former Lyttle entries and whether this was a violation of the restrictive provisions of the Desert Land Act, 43 U.S.C. 329. At the time of the quiet title suit the Zwangs had a cause of action against Mrs. Lyttle for the time and money they had expended for the benefit of the Lyttle entries. After the

entries were patented this cause was settled by the conveyance of a portion of the land which was no longer under the jurisdiction of the Department of the Interior. In these circumstances I conclude that this transaction did not violate the provision of the Desert Land Act quoted above.

[1] In its exceptions to the recommended decision, contestant argues that the Administrative Law Judge incorrectly applied *Griffis v. Squire, supra*, and California state law to determine the federal law issue of the Zwangs' eligibility under the desert land law. Contestant argues that the 1961 agreement between Mr. Zwang and the Lyttles mandates that this federal law issue be resolved adversely to contestees. Contestant asserts that the 1961 agreement was not entered into in good faith, and that from at least 1961 to 1967 when the Lyttles' entries were patented, Darrell Zwang held more than 320 acres of desert land. Elodymae Zwang, a party to the settlement conveying part of the Lyttles' patented land, "has benefited from the illegal actions of her husband and such fraud should be imputed to the validity of her entry," contestant concludes. In its reply brief, contestant charges that Mrs. Zwang violated the holding limitation, based on California community property law.

Contestees argue in response: (a) that the United States is estopped by the judgment and verdict of the District Court from relitigating any of the issues decided there, including whether contestees held more than 320 acres within the meaning

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of sec. 329 (Reh. Ex. X-12, Part VI. C.); (b) Mr. Zwang's contract with the Lyttles was never concealed, nor was it consummated; and (c) Mrs. Zwang had no role in the agreement with the Lyttles until the settlement subsequent to patent. Contestees raised the estoppel issue at the hearing (Tr. 350-51), but the Administrative Law Judge apparently found it unnecessary to rule on the question because of his resolution of the case.

Contestant in its reply argues that collateral estoppel does not apply to the "holding" issue, as: (1) that issue was not necessarily decided, and should not be assumed to have been decided, by the general verdict returned by the District Court jury; and (2) collateral estoppel does not apply to the Secretary's authority to initiate proceedings in relation to the patenting of public lands, citing *United States v. U.S. Borax Co.*, 58 I.D. 426 (1943) <sup>4</sup> (Reply Brief at 5-6).

The *Borax* case deals only with the effect of a prior administrative determination. As was held in *United States v. Williamson*, 75 I.D. 338, 342 (1968), "prior to [passing of legal title], findings of fact and decisions by the Secretary or his subordinates are subject to

reevaluation and revision in proper cases. \* \* \*" (*Italics added*). We reject contestant's argument that a *Federal District Court judgment* to which the Department is a party will not collaterally estop the Department on the issues decided. See, e.g., *United States v. McClarty*, 17 IBLA 20, 43, 81 I.D. 473, 482 (1974).

Collateral estoppel applies, however, only to issues which were necessarily decided by the judgment and verdict in the first action. *Kauffman v. Moss*, 420 F.2d 1270, 1274 (3d Cir.), cert. denied, 400 U.S. 846 (1970); *Happy Elevator No. 2 v. Osage Const. Co.*, 209 F.2d 459 (10th Cir. 1954); *Burchett v. Bower*, 355 F. Supp. 1278 (D. Ariz. 1973). 50 C.J.S. *Judgments* § 719 (1947). *United States v. Fleming*, 20 IBLA 83, 98 (1975). This limitation on collateral estoppel is important when considering the effect of a general jury verdict. *Herman v. United States*, 289 F.2d 362, 368 (5th. Cir. 1961).

In the U.S. District Court litigation to cancel the Lyttle patents, the complaint (Ex. X-9) was grounded in fraud. Consistent with the complaint and the pretrial order (Ex. X-12), the judgment of the jury was "that fraud was not committed against the United States and that the patents issued to [the Lyttles] should not be canceled" (Ex. X-13). We regard the verdict as conclusive on the question of whether Darrell Zwang

<sup>4</sup> In *Borax* the Department rejected the contestee's claim of res judicata, i.e., a bar to the entire subsequent proceeding. Here the subsequent proceeding is a different "cause of action" upon a different charge, so only an issue of collateral estoppel is raised. See *United States v. International Building Co.*, 345 U.S. 502, 505 (1953).

committed fraud; the issue was explicitly and necessarily decided.<sup>5</sup> The jury's verdict does not mean, contrary to contestees' argument, that each and every issue posited in the pretrial order has been finally decided. See RESTATEMENT OF JUDGMENTS § 68(1)-(o) (1963). Specifically, it was not essential for the jury to determine that Darrell Zwang did not hold more than 320 acres of desert land (Ex. X-12, Part VI. C.), in order to conclude that no fraud was committed against the United States.

Collateral estoppel does not foreclose an action on the same transaction or set of facts when the subsequent action requires the application of a different legal standard. *Peterson v. Clark Leasing Corp.*, 451 F.2d 1291 (9th Cir. 1971). The issue now before the Board requires the application of a different, less stringent legal standard; even

though fraud is not committed, a desert land patent applicant must "proceed by means sanctioned by the desert land law." *United States v. Law*, 18 IBLA 249, 271, 81 I.D. 794, 805 (1974). Actions which do not constitute fraud may require rejection of the purchase application and cancellation of the entry. The District Court jury may well have thought that Zwang violated the holding limitation, but found the requisite proof of fraudulent intent lacking.

[2] One such provision of the desert land law that the entryman may not violate, whether in good or bad faith, is the prohibition in sec. 329, that "no person \* \* \* shall hold by assignment or otherwise *prior to the issue of patent*, more than three hundred and twenty acres of such arid or desert lands \* \* \*." (Italics added.) The Administrative Law Judge was correct in saying that the Lyttle-Zwang litigation was settled "by the conveyance of a portion of the land which was no longer under the jurisdiction of the Department of the Interior" (Dec. II, at 2). We agree with his implication that the acquisition of private land, which was or was not patented under the desert land law, cannot per se disqualify a desert land entryman, by its addition to his entry acreage, under the 320-acre rule. This does not, contrary to the Administrative Law Judge's conclusion, end the analysis. To this extent contestant is correct in its assertion (Exceptions at 3) that the Administrative Law Judge incorrectly used *Griffs*

<sup>5</sup> We note that at the time of the District Court jury verdict, Dec. 14, 1972, the Ninth Circuit Court of Appeals had not issued *Reed v. Morton*, *supra*, which reversed a District Court opinion, and held the desert land entries at issue for cancellation because of a development-conveyance contract covering the entries that the Circuit Court found to be fraudulent against the United States. The District Court opinions reversed in *Reed* (*United States v. Hood Corp.*, Civil No. 1-67-97, and *Reed v. Hickel*, Civil No. 1-65-86 (D. Idaho, July 10, 1970)), defined the scope of fraud in the acquisition of desert land at the time of the District Court action in this case. We would be disinclined to apply collateral estoppel to a verdict relying on subsequently invalidated precedent. See *Griffin v. State Board of Education*, 296 F. Supp. 1178, 1182 (E.D. Va. 1969). This record, however, including the pretrial conference order (Ex. X-12), contains no indication that the District Court opinion in *United States v. Hood Corp.*, *supra*, and *Reed v. Hickel*, *supra*, was in fact relied on in *United States v. Lyttle, et al.*, *supra*.

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v. *Squire*, *supra*, to conclude that no violation of the acreage limitation occurred. The issue is, did the Zwangs, by virtue of the contract to develop and receive conveyance of the Lyttle entries, hold "by assignment or otherwise" more than 320 acres during the life of the Lyttle entries.

We hold that Darrell Zwang did so hold more than 320 acres of desert land during the period both his and the Lyttles' entries were running. Under the terms of the contract to develop and receive conveyance (Ex. 19, Attachment A), Zwang promised to pay \$25,600 in addition to the costs of improvement of the land in the two Lyttle entries, in exchange for the Lyttles' conveyance of the two parcels to him, conditional only on the Lyttles' acquiring patents after Zwang improved the land. Zwang had all the rights and duties of an entryman under the contract, and we hold that he "held" those entries "by assignment or otherwise" within the meaning of the proscription in sec. 329. *United States v. Shearman*, 73 I.D. 386, 427-28 (1966), *sustained sub nom. Reed v. Morton*, *supra*. 43 CFR 2521.3(c) (2) (1975), formerly 43 CFR 232.17(b) (1964); *Herbert C. Oakley*, 34 L.D. 383 (1906). From the time the agreement with the Lyttles was signed in 1961 until the Lyttles' entries were patented in 1967, Mr. Zwang held an interest in more than 320 acres of desert land by virtue of his own entry and the contract with the Lyttles.

[3] The amended contest complaint in R(LA)-096387 similarly charged Elodymae Zwang with a violation of the 320-acre limitation by virtue of the same set of facts, namely the agreement and the settlement of the litigation with the Lyttles. In the order remanding the cases for the second hearing, we noted that Elodymae Zwang may have violated sec. 329 if her husband did, since California is a community property state. Contestant argues that although Mrs. Zwang was not a party to the contract in 1961, she received the conveyance from Mrs. Lyttle in their 1969 settlement as a co-owner, and "has benefited from the illegal actions of her husband and such fraud should be imputed to the validity of her entry" (Contestant's Exceptions at 7).

Mr. Zwang's actions were illegal, but that does not mean that they were fraudulent. The District Court jury found that "no fraud was committed" in the transaction at issue. It is unnecessary to dispute or avoid that finding, however, in order to rule that Darrell Zwang's actions are to be ascribed to her on the issue of excess holding. Under standard community property law, the earnings of the husband during the marriage are presumed to be community property. Earnings include contractual benefits arising from the employment, labor and management of the husband. Cal. Civil Code § 5110 (1970). This statutory presumption could be rebutted by a

showing that the property was acquired by the proceeds of the husband's separate property. See *Thomasset v. Thomasset*, 122 Cal. App. 2d 116, 264 P.2d 626 (1954). The record contains nothing indicating that the contract at issue was to be acquired as separate property, i.e., by the transfer in form of separate funds. Further, the record does indicate that the time and management, if not the money as well, invested by Mr. Zwang in the Lyttle entries are "earnings" under California community property law. The Lyttle parcels acquired in the settlement are community property, and are so described in the settlement deed; the presumption is corroborated in this case. More importantly, in the absence of evidence to the contrary, the contract rights under the 1961 agreement executed by Darrell Zwang are presumed to have been community property.

Thus, insofar as Darrell Zwang held more than 320 acres of desert land by holding the Lyttle entries under the 1961 agreement, so did Elodymae Zwang. Henceforth, the discussion will treat both contestees equally; Elodymae Zwang's entry R(LA)-096387 stands or falls with the validity of her husband's entry R(LA)-096388.

[4] Not all contracts or agreements that violate provisions of the Desert Land Act will be held against the entryman. The Board, in appropriate circumstances, will recognize the voluntary rescission of such an illegal agreement and proceed to the merits of the final proof,

provided the entryman executed the illegal agreement in good faith. *United States v. Law, supra* at 260-61, 81 I.D. at 800; *Lois L. Pollard*, A-30226 (May 4, 1965); *Blanchard v. Butler*, 37 L.D. 677 (1909); *Herbert C. Oakley, supra*.

In each of these cases the Department was proceeding against the entries which were the subjects of the illegal agreements at issue. See also, *United States v. Grigg*, 19 IBLA 379, 82 I.D. 123 (1975). In *Grigg*, one of the entrymen was a partner in the firm holding the illegal assignment, but his entry was included in the assignment. This is the first case in which the purchaser under an illegal executory agreement has had his own entry, which was not subject to the agreement, challenged on that basis. We hold this manner of proceeding proper. This case involves not just an illegal contract to convey desert land subsequent to patent, but a violation of the 320-acre limitation. In such a case each and every entry held by the purchaser, whether or not held under the illegal agreement, is vulnerable to challenge by virtue of the excess holding. The violation and the sanction are against the party, not solely against the entry. See *United States v. Morris*, 19 IBLA 350, 375-76, 82 I.D. 146, 158 (1975); *United States v. Law, supra* at 263-64, 81 I.D. at 801.

[5] We proceed to examine whether the doctrine of voluntary rescission is applicable here. In *Lois L. Pollard, supra*, the entrywoman contracted to convey the des-

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ert land entry, subsequent to patent, to the contractor who promised to improve and reclaim it. The entrywoman obtained a state court injunction prohibiting the contractor from going on the entry and returned the down payment because of the contractor's default in performance of the required cultivation and reclamation work. Although the rescission was not prompted by recognition of the illegality of the executory contract, the Department applied the rule, citing *Blanchard v. Butler, supra*.<sup>6</sup> It held:

After the litigation ended, Mrs. Polard was in exactly the same position she would have been in if she had voluntarily rescinded the contract.\* \* \* It would be unduly harsh to hold that an entryman who in good faith pursues a legal remedy which restores the status quo is to be thereafter denied the shelter of a Departmental policy available to one who has violated the same regulation but corrects the violation on his own after learning of his error.\* \* \*

The BLM was instructed, if it had no reason to challenge appellant's assertions of good faith, to process her final proof, that is, proof based on acts of improvement and reclamation not made under the illegal contract.

<sup>6</sup>In *Blanchard* the offending homestead entryman rescinded the executory contract and tendered back the down payment upon learning of its illegality. The Department dismissed a contest against the final proof which was based on the illegal agreement and which had been filed by the prospective "purchaser" of the entry.

In *United States v. Law* this Board declined to apply the doctrine of voluntary rescission to four entrymen who entered lease-option agreements containing the following terms. The single lessee promised to pay rental, reclaim and cultivate the four entries, pay all irrigation district fees and taxes, and assist in the presentation of final proof, in exchange for complete control over the entries for the 15-year lease term and the right to purchase and receive title to the lands at that time. The parties rescinded the lease-option agreement more than a year after final proof was filed. The Board held the doctrine inapplicable because: the life of the entries had run; contest had been filed prior to rescission; the entries would pass to patent subject to huge liens in favor of the lessee; and the illegal contract involved five entries. *United States v. Law, supra* at 262-68, 81 I.D. at 800-03.

The present case lies between the two just described. The situation is less egregious than *Law* in that: there are no liens or prospective foreclosures on these, the contractor's own entries; the scale of the illegal contract and project is smaller than that in *Law*; and the contract collapsed prior to the filing of the contest. However, the present case is more egregious than *Polard* in that the rescission was not voluntary; the lives of the entries have run; a lien was asserted to acquire one of the other entries; and

there is no chance to restore the status quo and for the entryman to show the "sincerity of his repentance," the phrase used in *Law* and derived from *Blanchard v. Butler*, *supra* at 680.

Contestees argue that this issue is controlled by the Department's decision in *Herbert C. Oakley*, *supra*. There the entryman had contracted to sell after patent, and the contract was rescinded only after the entry's life expired. The Department held (34 L.D. at 388):

In view of the doubt cast upon the validity of the original contract and the further fact that there is now on file with the Department an absolute revocation thereof, and the further finding of good faith on the part of the entryman at the time he initiated his claim, the Department is of opinion the proof offered, if in other respects satisfactory, should be accepted.

*Law* and *Oakley*, read in conjunction, indicate that the date of rescission is not conclusive, and is one of the facts, although an important one, used in judging the applicability of the rule of voluntary rescission. See *Lois L. Pollard*, *supra*. We agree with contestant that *Oakley* is not controlling here,<sup>7</sup> chiefly be-

<sup>7</sup> Contestant argues that this case is distinguishable from *Oakley* because Mr. Zwang did not contract to convey the land in his (or his wife's) entry after patent, as *Oakley* did (Reply brief at 6). We reject this basis for distinction; if this were a ground for distinction, *Law*, *Pollard* and *Blanchard* would be inapplicable too. Further, the implication is that the Department will not apply the doctrine of voluntary rescission to land not embraced in the illegal agreement. This is untenable. If the sanction for violating the desert land law can be applied to land not contained in the illegal agreement (as we held *supra*), then so can the "defense" of voluntary rescission be applied to such land.

cause the "doubt cast on the validity of the original contract" in *Oakley* was not, as in *Law* and in this case, solely the violation of the desert land law itself. There, the Department emphasized that the contract was unenforceable as an initial matter because it was entered into by a partner of the entryman, who had no interest in the entry, and no authority to contract on his behalf. This fact militated for recognizing the entryman's rescission of the contract. Thus, while *Oakley* is not controlling here, it and the *Law*, *Pollard* and *Blanchard* cases establish the relevant factors in ruling on whether the Department will honor the revocation of an illegal contract.

Contestant argues that here the contract was never rescinded but was in fact consummated in part, pointing to the Zwangs' ownership of half of the Lyttle entries through the settlement of their litigation (Contestant's reply brief at 6). Contestees argue that the conveyance in settlement was based on Mr. Zwang's counterclaim of a lien for the value of the improvements made, as established by California law, *Griffis v. Squire*, *supra*, and that the settlement cannot be considered as consummation in any event because the agreement provided for the conveyance of both Lyttle parcels.

We agree with contestees that the agreement was not fully consummated; Mr. Zwang's pursuit of his counterclaim remedies as a *defendant* in the quiet title action was not

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in execution of the contract. On the other hand, we do not think that the agreement was repudiated in a manner that invokes the doctrine of voluntary rescission in contestees' favor, for the following reasons.

First, the agreement was never truly rescinded by contestees. In fact, in 1967 after the Lyttles received their patents Mr. Zwang made written demand on Mrs. Lyttle (on her own behalf and as executrix of her late husband's estate) to convey the two parcels pursuant to the contract (Tr. 387; Ex. 19, Attachment B). For this purpose Mr. Zwang had placed his promissory note for \$20,600 in escrow pursuant to the written agreement. Rather, the contract was repudiated by Mrs. Lyttle when she refused to convey and filed the quiet title action (Ex. 18).

We do not regard contestee's pursuit of his legal remedies by way of counterclaim to the quiet title action as evidence against rescission of the contract. Contestee is obviously not to be penalized for having pursued his rights under state law to prevent Mrs. Lyttle's unjust enrichment at his expense. *Griffis v. Squire*, *supra* at 470-73, 73 Cal. Rptr. at 160-62. On the other hand, contestee's abandonment of his contract right to a conveyance of both entries is less than conclusive evidence of voluntary rescission. Contestee never acted to rescind the contract on his own; his only acts were

in response to the information that the vendor had already repudiated the contract as unenforceable. We do not in this case have truly voluntary rescission.

Second, the rescission of the contract, such as it was, did not come until long after the expiration of the life of both sets of entries. While the timing of the repudiation is *explained* by Zwang's testimony that the parties did not until 1967 learn of the agreement's potential invalidity, it is not *excused* thereby. In *United States v. Law*, *supra* at 262, 284, 81 I.D. at 800, 811, the majority rejected the argument that rescission after the life of the entries has expired is adequately excused by the fact that the parties only then learned of their violations of the desert land law. The Board emphasized that in *Pollard* the status quo was restored, and the entrywoman was able, after she repudiated the contract at issue there, to proceed to reclaim the entry herself. It is insufficient that the parties have terminated the contract upon learning of its illegality; the entryman must still be able, subsequent to repudiation of the contract, to "proceed [with reclamation and cultivation] by means sanctioned by the desert land law" within the life of the entry. *United States v. Law*, *supra* at 271, 81 I.D. at 805.

Third, the illegal agreement taken with the contestees' claims embraced a block of four entries, total-

ing 1,280 acres. To allow these entries to go unchallenged would decimate the express policy of the Desert Land Act to limit acquisitions under the Act to small unit farms. In *Pollard* the illegal contract to convey stood alone; here there was an illegal contract to convey and a violation of the 320-acre holding limitation.

Fourth, in *Law* the Board canceled the entries notwithstanding the mitigating factor that the contractor-developer and the entrymen had discussed their plan of development with Bureau officials. Even so the challenge to the entries was sustained. While the agreement here was not deliberately hidden from Bureau scrutiny, no such mitigating factor as tacit approval or the like exists in this case.

Taken together, these factors convince us that the doctrine of voluntary rescission is not to be applied in this case. We reiterate that this holding is not based on any finding of bad faith or fraudulent action on the part of the entrymen. But *Lois L. Pollard, supra*, emphasizes that the doctrine of voluntary rescission may be applied in certain circumstances, as long as the *sine qua non* of good faith on the part of the entryman is established. Good faith is required, but it alone is insufficient to invoke the doctrine. We are bound by the District Court jury ruling that Mr. Zwang and the Lyttles committed no fraud against the United States (Ex. X-13). The record is undisputed that Mr. Zwang was not aware of the acreage limitation or the illegality of

the executory sale agreement (Tr. 381, 394, 436). These facts show that there was no bad faith, but they do not of themselves invoke the doctrine of voluntary rescission on contestees' behalf, particularly since the statutory lives of the entries had expired.

As the foregoing discussion indicates, we find that the Administrative Law Judge erred when he limited his consideration: (1) to whether or not the conveyance in settlement of the Lyttle-Zwang lawsuit generated a holding in violation of the acreage limitation; and (2) to whether or not fraud was committed by the Zwangs (Dec. II, at 2). Accordingly, we decline to follow the recommendation in the Administrative Law Judge's second decision, we set aside that decision, and we sustain paragraph 5 of the amended complaints in each contest. The doctrine of voluntary rescission is not applicable in this case to excuse the contestees' violation of the statutory acreage limitation.

Because we find that the entries, as challenged, must be canceled, it is unnecessary to reach the issues presented by the joint appeal from the first decision of the Administrative Law Judge regarding the extent of the entries that can be farmed with contestees' irrigation system and crop plans. The joint appeal on these issues is dismissed as moot.

One issue remains to be discussed. In the decisions on appeal here, the Riverside Land Office accepted contestees' proof on 80 acres in each entry. The contest complaints issued

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Feb. 14, 1969, challenged the adequacy of contestees' proof on 240 acres of each entry ("Lot 1 of the NW  $\frac{1}{4}$ , and the NE  $\frac{1}{4}$  of said sec. 19" in R(LA)-096388, and "Lot 1 of the SW  $\frac{1}{4}$ , and the SE  $\frac{1}{4}$  of said sec. 19" in R(LA)-096387). Similarly, the contest complaints were amended to charge violation of the 320-acre limitation by adding subsec. (c) to paragraph 5 of each complaint, and they did not modify or enlarge the acreage under contest to include the other 80 acres in each entry.

The rulings above regarding the illegal agreement and the holding of more than 320 acres appear to apply equally to the 80 acres of each entry not contested. However, because this acreage was not joined in the contest, either by complaint or as a part of the hearing,<sup>8</sup> we cannot now rule on the validity of these portions of the entries. This Board has de novo review authority over matters of law and fact litigated before an Administrative Law Judge. *State Director for Utah v. Dunham*, 3 IBLA 155, 78 I.D. 272 (1971). Further, the Department has the authority to reopen and reexamine findings and conclusions of Departmental officials, until legal title passes, to determine what rights have been earned under the public land law. *United States v. Meyers*, 17 IBLA 313, 316 (1974); *United States v. Gredigain*, 7 IBLA 1, 3-4 (1972); *United States v. William-*

*son, supra* at 342-43. This Board's authority does not extend, however, to making initial findings on matters not at issue in the contest. See *Harold Ladd Pierce*, 3 IBLA 29 (1971); see also *United States v. Northwest Mine & Milling, Inc.*, 11 IBLA 271, 274-75 (1973).

In such a case as this, in which contest is the proper manner of proceeding (*Johnnie E. Whitted*, 61 I.D. 172, 174 (1953); 43 U.S.C. § 329 (1970)), the law requires proper notice and opportunity for hearing before final Departmental action in the matter. *E.g.*, *United States v. Williamson, supra* at 342, 350. See *Orchard v. Alexander*, 157 U.S. 372, 383 (1895). We see no objection to proceeding against the remaining 80 acres of each entry,<sup>9</sup>

<sup>8</sup> As indicated in footnote two, *supra*, contestees have already sued for mandamus to compel issuance of patents, and lost. *Zwang v. Udall*, 371 F.2d 634 (9th Cir. 1967). We do not feel that the statute at issue in that litigation bars contest against the 80 acres in each entry not previously contested. The statute provides that mandamus will lie when 2 years have passed with "no pending contest or protest against the validity of such entry \* \* \*." Sec. 7 of the Act of March 3, 1891, as amended, 43 U.S.C. § 1165 (1970). In *Zwang v. Udall, supra*, the Ninth Circuit held that a contest or protest within the meaning of the Secretary's regulations was pending against the entry within 2 years of the issuance of receipt, even though a formal contest complaint had not been filed.

In this proceeding, it could be argued that there was a pending contest or protest "against the validity of [each] entry," even if each subdivision had not been explicitly contested. Further, the filing of a formal contest complaint may not be essential to initiate a contest or protest for the purposes of the statute. Contest against these entries may have been pending since the Oct. 23, 1963, decision of the Riverside Land Office on appeal here. However, we do not decide the issue.

<sup>9</sup> *United States v. Northwest Mine & Milling, Inc.*, 11 IBLA 271, 274-75 (1973).

and we presume that the proceeding will be governed by our rulings above,<sup>10</sup> but we cannot act against these portions of the entries without their having been contested, and the contestees having had notice and an opportunity for hearing in the matter.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the recommended decision of Jan. 16, 1974, is set aside, and for the reasons set out above the entries, to the extent contested by the complaints of Feb. 14, 1969, as amended, are canceled.

FREDERICK FISHMAN,  
*Administrative Judge.*

I CONCUR:

ANNE POENDEXTER LEWIS,  
*Administrative Judge.*

ADMINISTRATIVE JUDGE GOSS,  
CONCURRING SPECIALLY:

I concur in the above decision and point out the possibility that the appellants could, at some point, be reimbursed for valuable improvements should a third party acquire the land. *Of Mrs. Hazel Ingersoll Hall*, 4 IBLA 177, 178 (1971).

JOSEPH W. GOSS,  
*Administrative Judge.*

<sup>10</sup> As to the application of collateral estoppel in any future contest, see *Southern Pacific Railroad Co. v. United States*, 168 U.S. 1, 47-49 (1897), and contestees' brief at 3; filed herein May 30, 1974.

## OLD BEN COAL CORPORATION

6 IBMA 256

Decided July 13, 1976

Appeal by the Mining Enforcement and Safety Administration from a decision by Administrative Law Judge R. M. Steiner in Docket No. VINC 74-103 dismissing an Application for Review of a withdrawal order issued under sec. 104(a) of the Federal Coal Mine Health and Safety Act of 1969.

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Withdrawal Orders: Imminent Danger

A sec. 104(a) withdrawal order must be based on an imminent danger existing at the time of issuance of such order and cannot properly be based on a danger which is speculative, has subsided, or has been abated (30 U.S.C. §§ 801(j) and 814(a)).

APPEARANCES: Thomas A. Mascolino, Assistant Solicitor, and Frederick W. Moncrief, Trial Attorney, for appellant, Mining Enforcement and Safety Administration.

OPINION BY CHIEF  
ADMINISTRATIVE JUDGE  
DOANE

INTERIOR BOARD OF MINE  
OPERATIONS APPEALS

On Jan. 22, 1974, an imminent danger withdrawal order was issued in Old Ben Coal Corporation's (Old Ben) No. 21 Mine located in Franklin County, Illinois. The order cited the following conditions or practices:

July 13, 1976

Randy Galloway, supervised by Walter Douglas, was observed riding on top of a locomotive with his legs hanging over the side. The locomotive was pulling two empty mantrip cars into the bottom area at approximately 9 a.m. Violation of sec. 75.1403.

The order cited the following area of the mine:

This order prohibits the transportation of persons other than the locomotive operator on any locomotive not equipped with safe seating facilities.

At 1 p.m. on Jan. 22, 1974, the inspector issued a modification of the order as follows:

Order No. 1 MS is being modified to permit the locomotives to operate in order to evaluate mantrip practices provided; that no person other than the operator is transported on any locomotive unless safe seating facilities are provided and the person is safely seated with no parts of his body exposed outby the edge of the locomotive.

The order was terminated on Apr. 6, 1974, when it was determined that the operator had posted signs and instructed all persons to the effect that only the operator and persons using safe seating facilities were permitted to ride on any locomotive.

On Feb. 14, 1974, Old Ben filed an application for review of the above order and an evidentiary hearing was held on Oct. 1, 1974, in St. Louis, Missouri.

The facts relating to the alleged imminent danger are not in dispute. Randy Galloway was riding on top of a locomotive about 3½ to 4 feet off the mine floor (Tr. 18), with his legs hanging over the side. The

locomotive was not equipped with seating facilities and was moving 1 or 2 miles per hour (Tr. 27). The locomotive stopped when it approached MESA Inspector Mike Sakovich and Old Ben Safety Manager Dennis Frailey. Galloway got off the locomotive and Sakovich then issued the imminent danger withdrawal order. At the No. 21 Mine a policy was in effect permitting men to ride on top of the locomotives but not with their legs hanging over the side (Tr. 59, 74). As a consequence of the order, Old Ben installed safe seating facilities on all locomotives (Tr. 63).

In his Feb. 12, 1976 decision granting the application for review, the Administrative Law Judge (Judge) stated that the Act<sup>1</sup> clearly contemplates that an imminent danger must be in existence at the time a sec. 104(a) order is issued. He reasoned further that where an imminent danger does not exist at the time of issuance, an inspector could not reasonably determine that a peril to life or limb exists, or would exist if normal operations to extract coal continued. Applying this rationale to the facts, the Judge concluded that even assuming that an imminent danger ever existed, such danger was abated prior to the issuance of the order when Galloway got off the locomotive, and that the order was therefore improperly issued.

MESA recognizes that there was no danger at the time the order was

<sup>1</sup> 30 U.S.C. §§ 801-960 (1970).

issued because Galloway was no longer riding on the locomotive. It maintains, however, that an imminent danger existed, that such danger was the mine-wide "practice" of men riding on top of locomotives, and that this danger was not eliminated until the practice was eliminated throughout the mine. In support of its position, MESA has submitted two decisions of Administrative Law Judge E. Kendall Clarke upholding imminent danger withdrawal orders where men were observed riding on mine vehicles without safe seating facilities. Old Ben has filed no brief in the appeal.

It is our view that the Judge correctly vacated the withdrawal order on the ground that any imminent danger, if one existed, did not exist at the time of issuance of the order. Sec. 3(j) of the Act defines imminent danger as:

[T]he existence of any condition or practice in a coal mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated; \* \* \*.

Sec. 104(a) of the Act provides:

If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the area throughout which such danger exists, and thereupon shall issue forthwith an order requiring the operator of the mine or his agent to cause immediately all persons, except those referred to in subsec. (d) of this section, to be withdrawn from, and to be prohibited from entering such area until an authorized representative of the Secretary determines that such imminent danger no longer exists.

These provisions of the Act make it clear that an imminent danger withdrawal order can be properly issued only if an imminent danger exists at the time of issuance. No provision is made for issuance where a danger is speculative, has subsided, or has been abated. The mere existence of this policy, allowing men to ride on locomotives, did not constitute an imminent danger.<sup>2</sup> We note also that the cases decided by Judge Clarke are distinguishable since in those cases abatement had not occurred before the orders were issued. We conclude that the Judge correctly vacated the withdrawal order and that his decision should be affirmed.

### ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), the decision in the above-captioned proceeding IS HEREBY AFFIRMED.

DAVID DOANE,  
*Chief Administrative Judge.*

I CONCUR:

HOWARD J. SCHELLENBERG, JR.,  
*Administrative Judge.*

<sup>2</sup> Though not precluding the issuance of sec. 104(a) orders, 30 CFR 75.1403-1(b) sets forth a procedure to be followed for correction of unsafe practices with respect to transportation of men and materials:

"The authorized representative of the Secretary shall in writing advise the operator of a specific safeguard which is required pursuant to sec. 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a notice shall be issued to the operator pursuant to sec. 104 of the Act."

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**APPEAL OF TIMOTHY MASON****IBCA-1076-9-75**Decided *July 29, 1976*

**Contract No. 52500-CT5-436, Fish Lake Fence #3 and Cattleguard, Bureau of Land Management.**

**Denied.**

**1. Contracts: Disputes and Remedies: Burden of Proof—Contracts: Disputes and Remedies: Termination for Default: Excess Costs—Contracts: Performance or Default: Excusable Delays**

When the contractor is at fault for failure to perform the contract within the contract period and cannot establish any cause for an excusable delay, the Government is justified in terminating the contract for default and assessing excess procurement costs and liquidated damages.

**APPEARANCES:** Mr. Larry C. Johns, Johns & Johns, Attorneys at Law, Las Vegas, Nevada, for the appellant; Mr. Gerald D. O'Nan, Department Counsel, Denver, Colorado, for the Government.

**OPINION BY ADMINISTRATIVE JUDGE VASILOFF**

**INTERIOR BOARD OF  
CONTRACT APPEALS**

*Findings of Fact*

As the successful bidder appellant was awarded the contract on May 2, 1975, in the amount of \$14,914. Under the contract appellant was required to furnish labor, equipment and materials to con-

struct approximately 2,700 rods of barbed wire fence, 12 standard gates, 1 standard five-post corner, and 1 double panel cattleguard. The cattleguard grid and end wings were to be furnished by the Government. Approximately 2,700 steel posts and between 250-260 wooden posts would be required to perform the work (Appeal File Ex. 2; Tr. 152). Each steel post was to be spaced 16½ feet center post to center post (Appeal File Ex. 2). The work site was located in Nye County, Nevada. The contract included Standard Form 23-A (Oct. 1969 Edition), and a liquidated damages clause of (\$25 per day for each calendar day of delay). Work was to commence within 10 calendar days after receipt of notice to proceed and was to be completed within 65 calendar days from date of receipt of such notice. Notice to proceed was received by appellant on May 13, 1975, which established the completion date as July 17, 1975 (Appeal File Ex. 4). At the pre-construction conference on May 13, 1975, the time limit of the contract was discussed. According to the testimony offered by the Contracting Officer's authorized representative (COAR), appellant had stated at such conference that the 65 calendar days were sufficient to complete the work (Appeal File Ex. 3; Tr. 168).

On May 15, 1975, the appellant met with the COAR at the work site to discuss the flagging of the fence line. Appellant testified he

was told by the COAR that the entire fence line was flagged (Tr. 13, 57, 113). In flagging the fence line the Government used an 8-foot steel post with a white cloth flag affixed, spaced 50 to 75 yards apart in the tree area and farther apart in areas with no trees. The fence was to be built in a straight line from flag post to flag post (Tr. 151, 152). Approximately two-thirds of the terrain was flat and the remainder was up and down hills (Tr. 81).

The first work commenced on May 16, 1975, when appellant worked 2 hours laying out wire and cutting trees (Tr. 15). On the next day appellant erected about 640 to 700 steel posts (Tr. 15, 62, 63). On Sunday, May 18, 1975, appellant telephoned and stated some steel posts had been driven. On the following Monday, May 19, 1975, the COAR visited the work site to look at the work and found steel posts with 1-inch splits from the top down and improper spacing from 12 feet to 20 feet as well as steel posts out of alignment (Tr. 114, 115, 148, 153).

The COAR testified that during the remaining portion of the week he attempted to contact the appellant two or three times a day without success (Tr. 115). On Friday of that week, May 23, 1975, he left a note on the door knob of the appellant's trailer house located at the work site and used by appellant as his headquarters. The note was affixed to the door knob with an elastic band after the COAR at-

tempted to open the door but found it locked (Tr. 115, 116, 148, 149). The COAR stated in the note that appellant not perform any further work until he contacted the COAR to discuss the fence construction (Appeal File Ex. 7). Appellant testified he found the note inside the trailer on the floor on June 4, 1975 (Tr. 60). No construction work was performed by appellant from May 17 to June 4, 1975, and he was not at the construction site, except for 12 days, from May 17 to June 30, 1975 (Tr. 61, 73).

On May 29, 1975, the Contracting Officer wrote a letter to appellant in which he stated that the steel posts were not spaced pursuant to the specifications, that some steel posts had the tops split and that while approximately 23 percent of the contract performance time has expired only 15 percent of the contract work was accomplished. Within 7 calendar days of receipt of the letter, appellant was requested to furnish the Contracting Officer with a schedule establishing the procedure appellant planned to follow to correct and finish the work (Appeal File Ex. 5). Upon receipt of this letter, appellant telephoned the office of the COAR (Appeal File Ex. 6). On June 5, 1975, the acting COAR met appellant at the construction site where the split steel post tops and improper spacing was pointed out. Appellant was told to remove the damaged steel posts and correct the spacing. At the same meeting appellant was given a form entitled Instruction to

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Contractor wherein appellant was ordered to remove all damaged steel posts and correct the spacing and alignment of the steel posts (Appeal File Ex. 6, 8). Again on June 10, 1975, appellant met with the COAR at the job site. The COAR and appellant measured the spacing of some of the steel posts, and appellant testified they were  $15\frac{1}{2}$  to 17 feet apart although he knew the specifications required  $16\frac{1}{2}$  feet (Tr. 18, 62, 63). In addition, appellant admitted that approximately 50 percent of the erected steel posts were damaged at the top, from a hairline crack to a mushroomed top (Tr. 21, 64, 65). It should be noted that by June 10, 1975, appellant had still only erected from 640 to 700 posts.

On June 18, 1975, appellant replied by letter to the Contracting Officer's letter of May 29, 1975. In checking the spacing, wrote appellant, he could not find any steel posts less than 15 feet nor more than 17 feet apart. Further, appellant stated he would remove the damaged steel posts and drive the new steel posts at the proper spacing (Appeal File Ex. 10). In his letter to the Contracting Officer of June 23, 1975, appellant stated that "too many of the posts are still splitting," and requested a letter from the Contracting Officer to the effect that the steel posts were of poor quality so that appellant could furnish the letter to his supplier (Appeal File Ex. 11).

A quality control inspection was

conducted by Mr. Randall B. Windfeldt for the Government on June 25, 1975. At this date approximately 2 miles of steel posts had been installed. Mr. Windfeldt stated in his Report to the Files that in measuring the steel posts he found the distance varied from  $14\frac{1}{2}$  feet to  $15\frac{1}{2}$  feet with some posts exceeding  $16\frac{1}{2}$  feet by 6 to 7 inches. After inspecting 95 percent of the steel posts installed, 50 to 60 percent of the steel posts were split or had broomed tops. In his report and in his testimony, Mr. Windfeldt described the procedure utilized by appellant in driving the steel posts into the ground. A jack hammer mounted in the bed of a pickup truck was used to drive the posts. The head of the hammer was a round cup shaped attachment which was  $1\frac{1}{2}$  inches in diameter and  $1\frac{1}{2}$  inches deep. The cup-shaped attachment was too small in diameter to cover the top of the steel post. As a consequence, the top of the steel post would mushroom, since the post was "T" shaped (Appeal File Ex. 13; Tr. 158, 163, 165). Mr. Windfeldt recommended to the Contracting Officer that all installed steel posts be removed.

Exhibit 13 in the Appeal File contains photographs of the tops of the steel posts, which show a wide split or a mushroom effect. On direct examination the appellant admitted probably 25 percent of the installed steel posts had the tops damaged as they appear in the photographs (Tr. 96).

A representative from the supplier of the steel posts testified for appellant that the steel posts supplied to appellant were no different than the steel posts always obtained from the same manufacturer (Tr. 104). In selling this same type of steel post from the manufacturer this same witness testified he had never received any complaint (Tr. 104). Another witness for the appellant, a fence contractor, testified that in his experience a certain percentage of each shipment of steel posts delivered from any manufacturer will have a hairline split of about one-half inch (Tr. 110, 111).

In his letter of July 10, 1975, addressed to the Contracting Officer, appellant admitted he was experimenting with a "hydraulic post pounder" in driving the steel posts and complained of the difficulty encountered in its use (Appeal File Ex. 19). Mr. Mason also stated he could not adjust the hydraulic post pounder to control how hard it would hit the steel post (Appeal File Ex. 6). During the hearing appellant admitted that improper driving of the steel posts would damage the tops of the posts (Tr. 87, 88).

Upon receipt of appellant's letter of June 23, 1975, the Contracting Officer wrote to the appellant on June 26, 1975. The Contracting Officer stated he had been contacted by appellant's supplier of steel posts who agreed that any split posts would be replaced with good posts. The Contracting Officer also instructed appellant to proceed

with other work on the project (Appeal File Ex. 12). An Instruction to Contractor dated June 27, 1975, from the Contracting Officer was received by appellant on July 2, 1975. Appellant was instructed to remove all erected steel posts and also the steel posts stored at the work site from the construction area and to replace the posts with steel posts meeting the specifications of the contract. During the period appellant was without steel posts he was instructed to proceed with construction of stress panels, gates and five-post corners (Appeal File Ex. 17). On July 11, 1975, appellant wrote to his supplier stating that all steel posts had to be removed but he would wait until July 18, 1975, to do so. Accordingly, it was sometime after July 23, 1975, that the supplier dispatched a truck to pick up the steel posts. Although the supplier delivered 2,500 steel posts to appellant, 285 posts could not be accounted for so the supplier picked up a total of 2,215 posts (Tr. 105).

For the first time, on July 10, 1975, the appellant complained about the flagging of the fence line by writing to the Contracting Officer (Appeal File Ex. 19). On July 17, 1975, the Contracting Officer replied by letter and stated the project inspector has been notified to check the flagging. On July 24, 1975, the COAR wrote a letter to the Contracting Officer with an attached map and photographs. The map sketched the fence line which consists of four separate straight

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lines. The photographs showed the terrain of the land (Appeal File Ex. 25).

On July 12, 1975, appellant requested a 30-day extension of time to complete the work, with the extension period to commence after the new steel posts are delivered on the work site (Appeal File Ex. 21).

In a telegraphic notice received on July 28, 1975, appellant was informed by the Contracting Officer that the contract performance time had expired July 17, 1975, and very little work has been accomplished on the job. Appellant was given 10 days after receipt of the telegram to demonstrate his intention and ability to complete the work. Appellant was told that failure to so demonstrate may result in termination of the contract and completion of the work by other forces with any excess costs and liquidated damages involved to be assessed against him. If there were any excusable causes for delay, appellant was instructed to document such causes and supply the evidence to the Contracting Officer (Appeal File Ex. 23). Appellant responded to the telegram by letter dated July 28, 1975. Appellant requested the "exact specifications on these posts to send to the supplier," and stated that he would proceed to finish the contract (Appeal File Ex. 27). By letter dated Aug. 8, 1975, the Contracting Officer stated that the specifications for the steel posts were set out in the contract, Paragraph E of the Fence Constructions

Specifications Supplement (Appeal File Ex. 30).

Another quality control inspection was made by Mr. Windfeldt on Aug. 27, 1975. Measurements were taken of the distance between the steel posts and the average was 16 feet, 9 inches, whereas the contract specifies 16 feet, 6 inches. The cattleguard had not been installed as of this date. No work had been performed by appellant for 2 to 3 weeks (Appeal File Ex. 33).

On Sept. 4, 1975, the contract was terminated for default. The appellant was informed by the Contracting Officer that he would be held liable for any increased costs to complete the contract (Appeal File Ex. 35).

At the hearing and in the briefs filed with the Board, appellant advances the following alternative positions: (1) the termination for default was not justified; and (2) assuming there was cause for the termination, the Government failed to follow the proper procedure in terminating the contract. In its briefs the Government agrees with the issues as set forth by the appellant.

### *Decision*

A matter that arose during the hearing was whether there was adequate flagging on the construction site to enable appellant to perform the work. Paragraph F-1-C of the specifications provides in pertinent part:

Government will locate fence lines with stakes at angle points, ends and

within sight distances between angle points.

The testimony of the COAR is that the entire job was flagged with 8-foot high steel posts with a white flag affixed. The white flag posts were spaced 50 to 75 yards apart in the tree areas and farther apart in areas with no trees. Appellant waited until July 10, 1975, to register a complaint about flagging. This was 7 days before the contract completion date. Although the testimony is conflicting on whether the fence line was adequately flagged, there is no evidence in the record that appellant was delayed due to any alleged failure to adequately flag the fence line. In these circumstances and since the appellant concedes the inadequate spacing of the steel posts, this issue is resolved against the appellant.

[1] Much testimony was given during the hearing on the steel posts used by appellant. Paragraph F-2-3b of the specifications provides in pertinent part as follows:

**3. CONTRACTOR-FURNISHED MATERIALS**—In event Contractor is required to furnish fence materials, the following specification subparagraphs (a) through (c) shall apply. Contractor shall furnish new, undamaged materials of the best quality of their respective kinds. Upon request, Contractor shall furnish to Contracting Officer the name of supplier, manufacturer, or producer of all materials.

\* \* \* \* \*

*b. Fence posts*

(1) Steel line posts shall be "T" bar type, channel, or "U" bar type, as Contractor may elect. Each shall have an

anchor plate welded or riveted to post and be furnished with not less than five (5) clip type wire fasteners. Steel posts shall be manufactured from wrought, rail, or new billet steel and shall weigh not less than 1.33 pounds per foot exclusive of anchor plate. Anchor plate shall weigh not less than 0.67 pound. Posts with punched tabs for fastening wires are not acceptable. All steel posts shall be painted. Steel posts shall be the length shown on drawings.

Appellant elected to use the "T" bar type fence post. Paragraph F-3-2 provides in pertinent part:

**2. INSTALLATION OF POSTS AND BRACES**—Depth to which posts shall be placed and spacing of posts and bracings shall be as shown on drawings. Steel posts shall not be used for end panel, corner panel, gate panel, or stress panel posts. All wood posts shall be set in dug holes, except that wood line posts may be driven upon written authorization by the Contracting Officer. Steel posts shall be driven except where rock formations prohibit driving. Posts which are driven shall be free of damage when in place, and any driven post which is split, twisted, or bent, or which had a broomed top shall be removed and shall be replaced with an undamaged post.

The Government's estimate of the splits was between 50 to 60 percent. There is a disagreement in the testimony on how many of the steel post tops were beyond the state of just having a hairline split, and thus were twisted, bent, mush-roomed, or broomed. The quality control inspector, Mr. Windfeldt, testified he had inspected 95 percent of the steel posts installed and that about 50 percent had tops that were beyond a hairline split or mush-roomed. Appellant himself testified that about 50 percent of the in-

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stalled steel posts had been damaged, some major and some minor.

The dispute in this matter is not about a fine hairline split or crack of one-half inch after the steel post has been installed. Indeed, the dispute is about the damaged tops of the steel posts after they have been installed, photographs of which appear in Exhibit 13 of the Appeal File. Appellant admitted about 25 percent of the installed steel posts were damaged as badly as the posts depicted in the photographs in Exhibit 13. While an attempt was made at the hearing to establish that the steel posts were defective when delivered to appellant by his supplier, the Board finds that the cause of damage to the steel posts was the appellant's method of installation. In making this finding, the Board has given considerable weight to the uncontradicted testimony of the Government's quality control inspector, Mr. Windfeldt, that the steel posts were damaged by the method of installation.

The specifications authorized the Government to require the removal of any steel posts which were split, twisted, bent or which had a broomed top. Appellant cannot complain that the Government by the exercise of this right hindered his performance of the work.

The Board concludes that the Contracting Officer was justified in terminating the contract for default on September 4, 1975.

Appellant argues that even if there was justification for terminat-

ing the contract, the Government did not follow the procedure required by Clause 5(d) of Standard Form 23-A. The thrust of appellant's argument is that he was furnished defective steel posts by his supplier and was thus entitled to an extension of time until he could secure replacement steel posts from another source. Based upon the evidence of record in this case the Board finds that the steel posts supplied to appellant were not defective but that they were damaged by the method adopted by the appellant in installing them. Even if the Board had found, however, that some part or all of the delay involved were attributable to the supplier having furnished defective posts, it would not have availed the contractor where, as here, no showing has been made that the cause of the delay arose from "unforeseeable causes beyond the control and without the fault or negligence" of the supplier. (See Subparagraph (d) (1) of Clause 5, General provisions.)<sup>1</sup>

Work required, other than the installation of steel posts, was the

<sup>1</sup> See *Gard Industries, Inc.*, GSCBA Nos. 3614, 3615 (July 28, 1972), 72-2 BCA par. 9593 ("\* \* \* Certainly, to the extent that performance was delayed because a supplier furnished the Contractor with supplies which did not meet specification requirements, the performance failure was not excusable \* \* \*"); *Jo-Bar Manufacturing Corp.*, ASBCA No. 11391 (Oct. 31, 1966), 66-2 BCA par. 5949; *Ellin Peterson Construction Co.*, IBCA-532-12-65 (Oct. 20, 1966), 66-2 BCA par. 5906. Cf. *City Blue Print Co.*, ICBA-978-11-72 (Oct. 19, 1973), 73-2 BCA par. 10,292; *Schurr & Finlay, Inc.*, IBCA-644-5-67 (Aug. 27, 1968), 75 I.D. 248, 68-2 BCA par. 7200.

clearing of the fence line where necessary, installing the 12 standard gates, 1 standard five-post corner, 1 double panel cattleguard, H panels, stress panels, and installing between 250 and 260 wooden posts. Appellant was at the construction site 12 days from May 17 through June 30, 1975. The record does not disclose how many days appellant was at the construction site in the month of July 1975. It appears no contract work was done beyond August 1, 1975. As of Aug. 1, 1975, appellant had constructed 1 of the required 12 standard gates, the standard five-post corner, the H panels, and installed 50 of the required 250-260 wooden posts (Tr. 154). Thus there was work to be performed by appellant in addition to the steel posts which appellant failed to complete. One of the necessary items appellant was to furnish for this contract was the cattleguard. It may never have been ordered, as witness the following letter which appears in the Appeal File as Exhibit 24:

MASSEY FENCING COMPANY  
P.O. BOX 145 VERNAL, UTAH 84078

July 23, 1975

Timothy Mason

P.O. Box 187

Alamo, Nevada 89001

Re: Your Certified Letter dated July 21, 1975. Concerning *alleged* [sic] agreement on Cattleguards \* \* \* [sic]

Dear Sir:

This letter is to clarify our position concerning your letter referred [sic] to above.

We do not make Cattleguards [sic] to sell to other Contractors, as a normal course of our business. We have not sold Cattleguards [sic] to other Contractors,

unless we could make a fair profit on the project.

We have not nor have we at any time ever had an agreement with Mr. Timothy Mason to supply Cattleguards for him in any State.

For anyone to think we would buy the Cement, Buy the rebar, furnish the labor to construct Four (4) Cattleguards and then take them to Battle Mountain, Nevada for the price of \$500.00 has to be the most unbelievable, and unfounded story that I have heard in at least 10 years.

We do Considerable work for the Bureau of Land Management, the Quality of our work is not written into the contracts. We pride ourselves on our honesty and a trust with the B.L.M. Under no situation will we violate that trust by saying that we made an agreement with Timothy [sic] Mason, when in fact there was no agreement. The ridiculous [sic] underlined sentence above will serve to substantiate and prove the point I am making.

Best regards,

/s/ Thomas S. Jackson, Controller CC:  
to John Bailey

Although the contract completion date was July 17, 1975, the Contracting Officer did not terminate the contract until Sept. 4, 1975, a period of 49 days. During that time the Government investigated the allegation (made for the first time in the contractor's letter of July 10, 1975), that the fence line had been improperly flagged and the allegation that the steel posts furnished by the supplier were defective. There is nothing in the record to indicate that the appellant was delayed as a result of the alleged failure of the Government to adequately flag the fence line. The investigation conducted by the Government disclosed that defec-

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tive steel posts were not the cause of the delayed performance. Termination of the contract on Sept. 4, 1975, occurred within a week of the time the Government's quality control inspection concluded on Aug. 27, 1975.

While the Government's investigation was proceeding the contractor was afforded opportunities (i) to demonstrate his intention and ability to complete the work, (ii) to document any excusable cause of delay, and (iii) to propose a schedule of completion for the contract. The contractor failed to submit a contract completion schedule, however, and failed to support his allegations of excusable delay. Despite the interest the Contracting Office had shown in having the contractor complete the contract, the record does not disclose the number of days the contractor was at the construction site in the month of July and it does not appear that any work was performed after Aug. 1, 1975.

In these circumstances we are unable to find that the contractor changed his position to his detriment<sup>2</sup> during the period between the scheduled date for completion of the contract and the date of termination. We, therefore, find that the contract was properly termi-

nated for default for the failure of the contractor to perform the contract by the time specified.<sup>3</sup>

Due to appellant's failure to complete the work under this contract the Government awarded a repurchase contract to another contractor on Oct. 23, 1975. The work was fully performed and accepted by the Government on Dec. 10, 1975. The repurchase contract was in the amount of \$18,902.50, which has been paid by the Government, and a release was signed by the repurchase contractor on Jan. 2, 1976 (Government Ex. B, C; Tr. 142-147). The Government requested an extra five-post corner for \$125 in the repurchase contract which should be deducted from the total amount of the repurchase contract of \$18,902.50, leaving \$18,777.50. This necessary adjustment is reflected in the Contracting Officer's letter of Jan. 2, 1976, in which excess repurchase costs are correctly stated to be in the amount of \$3,863.50 (Government Ex. D).

### *Conclusion*

The appeal is denied.

KARL S. VASIOFF,

*Administrative Judge.*

I CONCUR:

WILLIAM F. MCGRAW,

*Chief Administrative Judge.*

<sup>2</sup> Application of the rule enunciated in *DeVito v. United States*, 188 Ct. Cl. 979, 990-91 (1969), would therefore not assist the contractor, assuming the rule to be applicable to construction contracts. For a discussion of the reason the *DeVito* rule is not generally considered to be applicable to construction contracts, see *Olson Plumbing and Heating Co.*, ASBCA Nos. 17965, 18411 (Mar. 31, 1975), 75-1 BCA par. 11,203 at 53,335-336.

<sup>3</sup> *C. A. Davis, Inc.*, IBCA-960-3-72 (June 12, 1973), 73-2 BCA par. 10,093; *Aargus Poly Bag*, GSBCE 4314, 4315 (May 26, 1976), 76-2 BCA par. 11,927.

**ESTATE OF GERALD MARTINEZ,  
SR.**

**5 IBIA 162**

*Decided Aug. 13, 1976*

**Appeal from an order denying petition  
for rehearing.**

**Reversed.**

**1. Indian Probate: Wills: Disapproval  
of Will—425.11**

Regardless of scope of Administrative Law Judge's authority to grant or withhold approval of the will of an Indian under statute, there is not vested in the Judge power to revoke a will which reflects a rational testamentary scheme disposing of trust or restricted property.

**APPEARANCES:** Boyden, Kennedy, Romney & Howard, by Scott C. Pugsley, Esq., for appellant, Amic Alice Martinez.

**OPINION BY ADMINISTRATIVE  
JUDGE SABAGH**

**INTERIOR BOARD OF  
INDIAN APPEALS**

The decedent, Gerald Martinez, Sr., died testate on Oct. 12, 1974, possessed of certain trust or restricted property on the Uintah and Ouray Indian Reservation and a balance of \$280.91 in his Individual Indian Money Account.

The record shows that the decedent married Nancy Lee Nick Martinez on or about July 30, 1957. They were divorced on or about Feb. 27, 1970. He then married Madeline Duncan Martinez on June 25, 1970. Surviving the de-

cedent were six minor children from the first marriage, Madeline Duncan Martinez, his surviving spouse and Amic Alice Martinez, minor child from the second marriage. A Tribal Court Divorce Decree (Uintah and Ouray Jurisdiction) among other things ordered the decedent "shall pay for the support of the said minor children (six children of the first marriage) a sum of \$35.00 for each child, until each child reaches the age of 21 years \* \* \*."

On Dec. 8, 1972, the decedent executed a last will and testament leaving all of his "property, real, personal and mixed" to his daughter by the second marriage, Amic Alice Martinez, and disinherited each of his other children, listing each of them by name and dates of birth, because his former wife "has turned these children against me and they do not seem to recognize me as their father \* \* \*."

At a hearing held before Administrative Law Judge William J. Truswell at Fort Duchesne, Utah, on May 16, 1975, the decedent's first wife, Nancy Martinez testified that the children by the first marriage were being supported through welfare payments.

On Aug. 15, 1975, Judge Truswell issued an Order disapproving the will because the decedent had an existing legal obligation to support all of his children; the six minor children by the first marriage are now on welfare; the decedent's estate is needed for the support of all of his children; and that the ap-

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proval of the will would remove the source forever.

The Judge further decreed in accordance with the laws of the State of Utah the decedent's heirs at the time of his death were and their respective shares are:

Madeline Duncan Martinez—wife 7/21  
Julia Ann Martinez—daughter 2/21  
(born 4-10-58)

Gerald Martinez, Jr.—son 2/21 (born 4-19-59)

Tracy Martinez—daughter 2/21 (born 11-8-62)

Adam Martinez—son 2/21 (born 5-16-63)

Larson Berry Martinez—son 2/21 (born 7-3-61)

Chanel Lynn Martinez—daughter 2/21  
(born 1-4-66)

Amic Alice Martinez—daughter 2/21  
(born 3-2-71)

Madeline Martinez, surviving spouse, as guardian *ad litem* for Amic Alice Martinez, petitioned for rehearing contending the Administrative Law Judge had abused his discretion in disapproving the will, had failed to consider relevant evidence and had premised his decision on false premises of law and fact. She also submitted her own sworn affidavit wherein she declared the six minor children by the first marriage were receiving social security benefits from the decedent's earnings. The petition was denied and an appeal taken to this Board. The grounds for the appeal are similar to those upon which the petition for rehearing was based.

Sec. 2 of the Act of June 25, 1910, 36 Stat. 856, *as amended*, by Act of Feb. 14, 1913, 37 Stat. 678, 25

U.S.C. § 373 (1970), provides in pertinent part:

That any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: *Provided, however*, That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior: *Provided further*, That the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator \* \* \*.

Absent proof of fraud or duress in the making of the will, or lack of testamentary capacity of the testator, may the Administrative Law Judge disapprove the will of a deceased Indian disposing of trust or restricted property?

The Court in *Tooahnippah (Goombi) v. Hickel*, 397 U.S. 598 90 S. Ct. 1316 (1970), perceived nothing in the statute that vests in a governmental official the power to revoke or rewrite a will that reflects a rational testamentary scheme.

The record reflects neither fraud nor duress in the making of the will nor lack of testamentary capacity. Instead, it reveals what we consider to be a rational testamentary scheme. The testator exhibited an awareness of those who were his heirs at law. In part "Second" of the will, the decedent left all of his

property, real, personal and mixed to his daughter Amic Alice, the only child from his "present" marriage. In part "Third" the decedent disinherited his wife, Madeline Duncan Martinez, "because she owns small, undivided interests in allotments inherited from her father \* \* \*." He disinherited his six minor children by the former marriage in part "Fourth," alluding to each child by name and birthdate. Moreover, he specifies the reason for their disinheritance, namely, "because she has turned these children against me and they do not seem to recognize me as their father \* \* \*."

The Court said in *Tooahnippah (Goombi) v. Hickel, supra* at 608:

To sustain the administrative action performed on behalf of the Secretary would, on this record, be tantamount to holding that a public officer can substitute his preference for that of an Indian Testator. We need not here undertake to spell out the scope of the Secretary's power, but we cannot assume that Congress, in giving testamentary power to Indians respecting their allotted property with the one hand, was taking that power away with the other by vesting in the Secretary the same degree of authority to disapprove such a disposition.

To recapitulate, the testator attempted to give his property to Amic Alice, his only daughter from his second marriage, to the exclusion of his surviving spouse and six children by the previous marriage. He disinherited the six children of the former marriage because his former wife had turned them against him and because they did not seem to recognize him as their father.

[1] We find based upon the facts before us that the decedent's will reflects a rational testamentary scheme and the Administrative Law Judge was not vested with the power to revoke said will.

We further conclude that the decedent Indian had the right to dispose of trust or restricted property free from intrusion in the form of a Tribal Court decree or otherwise. *See Blanset v. Cardin, et al.*, 256 U.S. 319, 41 S. Ct. 519 (1921).

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, we REVERSE the Order Disapproving Will and Determining Heirs issued by Judge Truswell on Aug. 15, 1975.

IT IS ORDERED that the will of the decedent, Gerald Martinez, Sr., executed on Dec. 8, 1972, be, and the same hereby is approved and his trust estate shall be distributed in accordance therewith.

This decision is final for the Department.

MITCHELL J. SABAGH,  
*Administrative Judge.*

I CONCUR:

ALEXANDER H. WILSON,  
*Administrative Judge.*

DONALD PETERS

26 IBLA 235

Decided August 17, 1976

Appeal from decision of the Alaska State Office, Bureau of Land Manage-

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ment, rejecting Native allotment application F-15742 (Anch.).

Set aside and remanded.

**1. Administrative Procedure: Generally—Alaska: Native Allotments—Contests and Protests: Generally—Hearings—Rules of Practice: Government Contests**

Where the Bureau of Land Management determines that an Alaska Native allotment application should be rejected because the land was not used and occupied by the applicant, the BLM shall issue a contest complaint pursuant to 43 CFR 4.451 *et seq.* Upon receiving a timely answer to the complaint, which answer raises a disputed issue of material fact, the Bureau will forward the case file to the Hearings Division, Office of Hearings and Appeals, Department of the Interior, for assignment of an Administrative Law Judge, who will proceed to schedule a hearing at which the applicant may produce evidence to establish entitlement to his allotment.

**APPEARANCES:** Donald C. Mitchell, Esq., Alaska Legal Services Corporation, Bethel, Alaska.

**OPINION BY CHIEF ADMINISTRATIVE JUDGE FRISHBERG**

**INTERIOR BOARD OF LAND APPEALS**

Donald Peters has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated June 25, 1975, rejecting his Native allotment application F-15742 (Anch.), filed pursuant to the Native Allotment Act of May 17, 1906, *as amended*, 43

U.S.C. §§ 270-1 through 270-3 (1970), 43 CFR Subpart 2561. The rejection was based on appellant's failure to present clear and credible evidence of his entitlement to an allotment.

Appellant's allotment application, dated June 29, 1971, describes 160 acres in Sec. 9, T. 21 S., R. 13 E., K.R.M. Appellant claimed seasonal use for subsistence living from 1952 to the present. In the application appellant explained his use as follows:

I've been using this land every year from 1952 to present for hunting and trapping. Some years it is one or the other. I visited here often as a child because my grandparents, aunts and uncles lived here. My grandparents and I feel this is my home. I feel like I could make a homestead here and make a living. I want my land in my name to keep in the family for generations to come.

BLM conducted a field examination of the land on Aug. 3, 1973. The field examiner found no evidence of use and occupancy by appellant. There were old buildings on the claim, but the examiner concluded that they had been deserted by non-Natives who had in prior years engaged in the mining or trapping business.

In Mar. 1975 the State Office informed appellant that his application would be rejected unless he supplied additional information in support of his claim within 60 days. On Apr. 18, 1975, appellant submitted additional evidence in the form of two affidavits, one signed by appellant and the other signed

by his sister, Catherine Peters. The State Office determined the evidence submitted to be insufficient and rejected the application by decision dated June 25, 1975.

The procedures followed by BLM in Native allotment cases came under judicial scrutiny in *Pence v. Kleppe*, 529 F. 2d 135 (9th Cir. 1976), *rev'g Pence v. Morton*, 391 F. Supp. 1021 (D. Alaska 1975). *Pence* was initiated by certain Native Alaskans, on their behalf and on behalf of all other Natives similarly situated, who asserted entitlement to allotments of public land pursuant to the Alaska Native Allotment Act of May 17, 1906, *supra*. They alleged that the procedures utilized by the Secretary of the Interior in determining whether to grant allotments denied them due process and sought injunctive relief requiring the Secretary to adopt and utilize procedures guaranteed to afford applicants due process. The district court dismissed the action on the ground that the granting or denial of an allotment was committed to agency discretion and not reviewable by the courts.

The Ninth Circuit Court of Appeals reversed the district court, holding that Native applicants for allotments have a sufficient property interest to warrant due process protection. In discussing "what process is due," the court stated:

\* \* \* [T]he Alaska Native applicants whose applications the Secretary intends to reject must be given *some* kind of notice and *some* kind of hearing before the rejection occurs.

\* \* \* \* \*

\* \* \* [A]t a minimum, applicants whose claims are to be rejected must be notified of the specific reasons for the proposed rejection, allowed to submit written evidence to the contrary, and, if they request, granted an opportunity for an oral hearing before the trier of fact where evidence and testimony of favorable witnesses may be submitted before a decision is reached to reject an application for an allotment. Beyond this bare minimum, it is difficult to determine exactly what procedures would best meet the requirements of due process. \* \* \* It is up to the Secretary, in the first instance, to develop regulations which provide for the required procedures, subject to review by the district court and, if necessary, by this court.

*Pence v. Kleppe*, *supra* at 142, 143 (italics in original).

Thus, the court did not attempt to define those procedures necessary to effectuate its mandate, leaving that determination to the Secretary. Since the court did not refer to the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.* (1970), except in regard to its jurisdiction, it apparently felt that all of the procedural requirements of that act need not be met. Nevertheless, this Department has generally applied procedures consonant with the requirements of the APA when it has been determined that due process requires notice and an opportunity for hearing, and it shall do so here.

While the court seemed to contemplate the promulgation of new regulations, past departmental practice discloses an alternative and more expeditious method of implementing the court's decision: application of the Department's existing contest regulations.

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Well-established precedent exists for determination by adjudication of matters which are subject to the Department's contest procedures. As early as 1893 the Department ruled that a homestead entry, once having been allowed, and being a matter of record, should not be canceled without notice to the entryman and opportunity to show why the claim should not be canceled. *William A. Fowler*, 17 L.D. 189 (1893). Desert land entries have been accorded similar treatment. See *Claude E. Crumb*, 62 I.D. 99 (1955); *Johnnie E. Whitted*, 61 I.D. 172 (1953). Notice and opportunity for a hearing have also been afforded to applicants for trade and manufacturing site patents under appropriate circumstances. *Bythel J. Compton*, 18 IBLA 148, 151 (1974); *Don E. Jonz*, 5 IBLA 204 (1972).

Until 1956 it was departmental practice to grant a mining claimant a hearing before a Land Office Manager prior to a decision on the validity of the mining claim. The Land Office Manager was not a qualified presiding officer within the ambit of the Administrative Procedure Act, *supra*. The Secretary ruled in *United States v. O'Leary*, 63 I.D. 341 (1956), that since a mineral claimant had a "property claim which may not be invalidated without due process of law," the provisions of the APA applied, and the hearing must be before persons qualified under the APA. As the other substantive provisions in the regulations relating

to contests were found to be in compliance with the provisions of the APA, the Department simply amended the procedures to provide that the hearings be before "Examiners." 21 FR 7622 (Oct. 4, 1956).

To carry out the mandate of the court in *Pence* and insure due process in the adjudication of Native allotment applications, the contest regulations included at 43 CFR 4.451 *et seq.* shall henceforth be applied to such cases. Incorporated in 43 CFR 4.451 by reference, with exceptions, are the provisions of 43 CFR 4.450, relating to private contests. Also applicable are the general hearings procedures contained in 43 CFR 4.20-4.30 and 4.420-4.423. These procedures, used in implementing the right to notice and an opportunity for hearing,<sup>1</sup> have been repeatedly approved by various federal courts. See *Orchard v. Alexander*, 157 U.S. 372, 383 (1895), relating to pre-emption claims; *Cameron v. United States*,

<sup>1</sup> Pursuant to the procedures and departmental decisions, where BLM determines a claim or application must be rejected as a matter of law, assuming the truth of all relevant matters stated in the claim or application, it may reject the claim or application without a hearing. See *Brace C. Curtiss*, 11 IBLA 30 (1973); *W. J. M. Mining and Development Company*, 10 IBLA 1 (1973); *Norman A. Whittaker*, 8 IBLA 17 (1972). The aggrieved claimant or applicant may appeal such decision to this Board. 43 CFR 4.400 *et seq.* If, however, BLM determines such a claim or application is invalid because the facts are not as stated therein, it must serve a contest complaint upon the claimant or applicant alleging wherein the claim or application is deficient. If the claimant or applicant answers within 30 days and thereby raises a disputed issue of material fact, the procedures outlined *infra* apply.

252 U.S. 450, 459-60 (1920), relating to mining claims. The United States Supreme Court has implicitly accepted the procedures as modified subsequent to *O'Leary* in a number of cases. *E.g.*, *United States v. Coleman*, 390 U.S. 599 (1968); *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963).

Accordingly, the present case, which involves a factual issue, will be remanded for proceedings pursuant to 43 CFR 4.451 *et seq.* Those procedures are summarized as follows.<sup>2</sup> Upon receipt of the present case file BLM should review the evidence. If it is determined that the application should still be rejected because of applicant's failure to show use and occupancy of the land or to comply with the other requirements of 43 CFR Subpart 2561, BLM should prepare a contest complaint and serve it upon the applicant. The contest complaint should particularize the grounds upon which the allotment is being contested.

The applicant will have 30 days from receipt of the complaint within which to file an answer in the BLM office which issued the complaint. If an answer is not filed within 30 days, the allegations of the complaint will be taken as admitted, and BLM will decide the case without a hearing. 43 CFR 4.450-7(a); *United States v. Weiss*, 431 F. 2d 1402 (10th Cir. 1970); *Sainberg v. Morton*, 363 F. Supp.

1259 (D. Ariz. 1973); *United States v. Weiss*, 15 IBLA 198 (1974). If an answer is filed raising a disputed issue of material fact, BLM will forward the case record to the Hearings Division, Office of Hearings and Appeals, Department of the Interior, for assignment of an Administrative Law Judge to hear the case. 43 CFR 4.450-7(b).

Upon assignment, the Administrative Law Judge will issue to the parties a formal notice of hearing. 43 CFR 4.452-2. A prehearing conference may first be ordered. 43 CFR 4.452-1. The hearing will be held in Alaska at a time and place fixed by the Administrative Law Judge. 43 CFR 4.452-2.

At the hearing BLM, represented by the Solicitor, will first go forward with its evidence. The applicant will follow with a presentation of his case. All parties will have the right to cross-examine and to rebut. The ultimate burden of proof as to entitlement to an allotment rests with the Native applicant.<sup>3</sup> See *Fos-*

<sup>2</sup> Pursuant to 43 U.S.C. § 270-3 (1970):

"No allotment shall be made to any person under sections 270-1 to 270-3 of this title until said person has made proof satisfactory to the Secretary of the Interior of substantially continuous use and occupancy of the land for a period of five years."

As defined in 43 CFR 2561.0-5(a):

"The term 'substantially continuous use and occupancy' contemplates the customary seasonality of use and occupancy by the applicant of any land used by him for his livelihood and well-being and that of his family. Such use and occupancy must be substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use."

As required by 43 CFR 2561.0-3, an applicant must be an "Indian, Aleut or Eskimo of full or mixed blood who resides in and is a Native of Alaska, and who is the head of a family, or is twenty-one years of age;" the land must be "vacant, unappropriated, and unreserved \* \* \*."

<sup>3</sup> The summary is intended only as a general outline. It is not intended, nor may it be relied upon, as a substitute for the specific procedures contained in the Department's regulations and their interpretation in departmental decisions.

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*ter v. Seaton*, 271 F.2d 836 (D.C. Cir. 1959). At the conclusion of the hearing the parties shall be given a reasonable amount of time by the Administrative Law Judge within which to submit proposed findings of fact and conclusions of law. 43 CFR 4.452-8(a).

As promptly as possible after the time allowed for filing proposed findings and conclusions, the Administrative Law Judge will render a written decision in the case. A copy of such decision will be served on all parties to the case. 43 CFR 4.452-8(b).

Any party, including BLM, adversely affected by the decision may appeal to the Board pursuant to 43 CFR 4.400 *et seq.*

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case remanded for further proceedings not inconsistent with the views expressed herein.

NEWTON FRISHBERG,  
*Chief Administrative Judge.*

WE CONCUR:

JAMES R. RICHARDS,  
*Director, Office of Hearings and Appeals.*  
*Ex-Officio Member of the Board.*

FREDERICK FISHMAN,  
*Administrative Judge.*

JOSEPH W. GOSS,  
*Administrative Judge.*

DOUGLAS E. HENRIQUES,  
*Administrative Judge.*

ANNE POINDEXTER LEWIS,  
*Administrative Judge.*

MARTIN RITVO,  
*Administrative Judge.*

EDWARD W. STUEBLING,  
*Administrative Judge.*

JOAN B. THOMPSON,  
*Administrative Judge.*

## CITY OF KOTZEBUE

26 IBLA 264

Decided August 20, 1976

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting a resolution adopted by the City of Kotzebue protesting the allowance of an application for withdrawal.

Appeal dismissed.

1. Delegation of Authority: Extent of—Appeals—Rules of Practice: Appeals: Generally—Secretary of the Interior—Withdrawals and Reservations: Authority To Make

Since the Bureau of Land Management has no authority to issue a public land order withdrawing land, such authority existing only in the Secretary, the Under Secretary, and the Assistant Secretaries of the Department of the Interior, recommendations by officers of the Bureau of Land Management relating to withdrawals are not subject to review under the provisions of 43 CFR 4.450-2 or 43 CFR 4.410.

APPEARANCES: Alan Sherry, Esq., Merdes, Schaible, Staley & Delisio, Inc., Anchorage, Alaska, for appellant.

OPINION BY CHIEF ADMINISTRATIVE JUDGE FRISHBERG

INTERIOR BOARD OF LAND APPEALS

By decision of Feb. 3, 1976, the Alaska State Office, Bureau of Land Management (BLM), rejected a resolution of the City of Kotzebue, which it treated as a protest to the allowance of an application by the Department of the Air Force for withdrawal of approximately 80 acres adjoining the Kotzebue Air Force Station for the protection of the water supply source of the Air Force Station. The City of Kotzebue filed a timely notice of appeal.

Subsequent thereto, the Kotzebue Native Corporation filed a petition to intervene and a motion to refer the case to the Alaska Native Claims Appeal Board as a more appropriate forum for consideration of the appeal. An examination of the case, however, has convinced us that quite apart from any question as to the jurisdictional boundaries between the two Boards, this Board lacks jurisdiction to review that decision for a different and more fundamental reason.

This case involves the review of a recommendation by the Alaska State Office that a withdrawal be approved. In *United States v. Foresyth*, 15 IBLA 43 (1974), we examined a withdrawal application to determine whether or not the application complied with the provisions of 43 CFR 2351.2(b) and to ascertain the effect of its notation

on the land office records. We expressly noted that we were not reviewing the substantive merits of a withdrawal, but merely ascertaining whether the procedural requirements mandated for such applications had been fulfilled. *United States v. Foresyth*, *supra* at 47. After reviewing the application to withdraw in *Foresyth*, the Board ruled that "the withdrawal application is defective and as a matter of law cannot be allowed until all the defects have been corrected," but pointed out that the notation of the application nevertheless segregated the lands sought therein. *Id.* at 54.

In the present case appellant has not questioned the procedural correctness of the Department of the Air Force's application to withdraw the land in question, nor has it even suggested that the application is defective. Rather, its objection is solely directed to the question of whether or not the withdrawal should be allowed. The State Office considered the resolution adopted by the City of Kotzebue to be a protest within the ambit of 43 CFR 4.450-2. This we believe to have been error, for reasons which we will now set out.

[1] The resolution adopted by the City of Kotzebue opposing the allowance of the withdrawal indicated that the City protested the proposed action. The difficulty in calling this a "protest" within the meaning of 43 CFR 4.450-2 arises in that the regulation applies to any action "proposed to be taken in any proceeding before the Bureau \*\*\*."

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[Italics added.] Withdrawal of public lands, however, is not an action taken by the Bureau of Land Management, but is one which is committed to the discretion of the Secretary of the Interior. The BLM Manual makes it clear that the role of the State Office, and indeed, of the Director, BLM, is merely advisory. Withdrawal of land is effectuated by the issuance of a Public Land Order, 43 CFR 2353.1, and under the terms of sec. 3 of the Executive Order No. 10355, 17 FR 4831, such an Order may only be issued by the Secretary, the Under Secretary, or the Assistant Secretaries of the Department of the Interior.

Thus, the BLM Manual provides that a Public Land Order "is an order effecting, modifying, or canceling a withdrawal or reservation, *which is issued by the Secretary of the Interior* \* \* \*." BLM Manual 2310.11E. [Italics supplied.] The Manual then states that "[t]he order should be accompanied by a draft memorandum to the Secretary, for signature by the Director, explaining briefly the necessity for and the purpose of the order." BLM Manual 2310.16. It further provides that reference should be made in the memorandum to "protests" against the withdrawal.

While the views of the City of Kotzebue may be a relevant factor in the eventual decision of the Secretary, the fact that the State Office was not dissuaded from recommending approval of the with-

drawal to the Secretary and so informed the City of Kotzebue is not a decision subject to appeal or protest to this Board. Inasmuch as the only decision regarding withdrawal is that of the Secretary, this Board has no authority to review an appeal or protest from such decision. 43 CFR 4.410. Moreover, it is our view that no authority exists anywhere within the Office of Hearings and Appeals to review decisions of the Secretary.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal of the City of Kotzebue is dismissed. In light of our disposition of the case, we make no rulings on the petitions filed by the Kotzebue Native Corporation.

NEWTON FRISHBERG,  
*Chief Administration Judge.*

WE CONCUR:

EDWARD W. STUEBING,  
*Administrative Judge.*

DOUGLAS E. HENRIQUES,  
*Administrative Judge.*

HOMER D. MEEDS

26 IBLA 281.

Decided August 26, 1976

Appeal from decision of Oregon State Office dismissing protest of closure of right-of-way Oregon 015245.

Set aside and remanded.

### 1. Rights-of-way: Generally—Rights-of-Way: Applications

The Act of July 26, 1866, R.S. 2477, 43 U.S.C. § 932 (1970), grants a right-of-way for the construction of highways over public lands not reserved for public uses. Where the Bureau of Land Management closes a 400-foot haul road, formerly part of a right-of-way issued to the Oregon State Highway Department on Oregon and California revested land for a material site, without considering the implications of the statute, and appellant submits evidence showing that the road has been used by the public for many years, the decision will be set aside and the case will be remanded for a determination of whether a highway has already been established under the statute or, if not to afford appellant an opportunity to file an application for a right-of-way under 43 CFR 2822.1-2.

**APPEARANCES:** Homer D. Meeds, pro se.

### *OPINION BY ADMINISTRATIVE JUDGE STUEBING*

### *INTERIOR BOARD OF LAND APPEALS*

Homer D. Meeds appeals from a decision of the Oregon State Office, Bureau of Land Management, dated Oct. 21, 1975, dismissing his protest to BLM's closing of a haul road previously used by the State of Oregon in connection with its right-of-way (Oregon 015245) for a material source.

The tract involved is Oregon and California Railroad (O & C) re-vested grant land. Previously the land was situated in the Rogue River National Forest, and the Forest Service had issued the Oregon State Highway Department a

permit to use the land as a source of material and to construct a road from the nearest public road to the pit site. Presumably, the haul road was constructed in the late 1940's or early 1950's. The land then came under the jurisdiction of the Bureau of Land Management (BLM) through an exchange with the Forest Service. On Nov. 5, 1964, the BLM issued the Oregon State Highway Department a grant of right-of-way over public lands for a material source and access road.

The strategic location of the road makes it important to the local residents. The road, approximately 400 feet in length, abuts Longanecker Road and forms a shortcut across Poorman's Creek from Forest Creek Road (county road) to Medford-Provolt Highway (State Highway 238). The alternative route increases the travel distance between Forest Creek Road and Highway 238 by 1.4 miles or 2.8 miles round trip.

One resident complained to the State about the noise and dust created by vehicles using the crossing, and the State responded by blocking the road. A controversy arose between those who wish to use the road and those who wish to have the alleged nuisance abated.

In an effort to keep the road open to the public, 38 residents signed a petition dated Nov. 25, 1974, requesting that the county declare the road to be a public road under the provisions of OR. REV. STAT. §§ 376.105 through 376.125, "Statutory Ways of Necessity." By letter of Dec. 10, 1974, Robert J. Carstensen, Director of Public Works, de-

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nied the petition on the grounds that the "Ways of Necessity" statute does not apply in this case.

The State of Oregon requested that the BLM accept a partial relinquishment of the right-of-way to cover the access road leading to the site.

As a prerequisite to accepting the relinquishment, the Bureau required the State to:

1. extend both ends of the existing road block that is north of Poorman's Creek;
2. remove the culvert in Poorman's Creek and dispose of the culvert;
3. construct a 5-foot high road block near the south end of the BLM property that is south of Poorman's Creek;
4. place metal reflective site posts between Longanecker Road and the south road block;
5. explore the possibility of erecting a "Dead End" sign at the junction of Longanecker Road and Highway 238.<sup>1</sup>

The State complied with these conditions and the Bureau accepted the partial relinquishment on Sept. 9, 1975.

On Sept. 30, 1975, Homer D. Meeds wrote to the Medford District Manager, BLM, stating in part:

I wish to appeal your decision to close the portion of Bureau of Land Management road that abuts Longanecker Road and Forest Creek Jackson County Road in T. 38 R. 3 W. Sec. 14, of Jackson County.

The Chief, Branch of Lands and Mineral Operations, Oregon State Office, BLM, responded on Oct. 21,

1975, with a letter decision dismissing Meed's protest. He explained that blocking the road was a prerequisite to accepting the State's relinquishment for the portion of land on which the haul road was constructed and cited 43 CFR 2801.1-5(i), which provides:

That upon revocation or termination of the right-of-way, unless the requirement is waived in writing, he shall, so far as it is reasonably possible to do so, restore the land to its original condition to the entire satisfaction of the superintendent in charge.

He further stated that the reason BLM required the State to block the road was because BLM has no present or future need of the road. He said that the grant of the right-of-way to the State neither stated nor implied that the road was to be open to the public. Since the county has no apparent interest in the road, as it rejected the petition of the residents, and since the BLM has no need for the road and sees no reason to accept liability for maintenance and unforeseen accidents, the Oregon State Office dismissed the protest.

Meeds appealed. The main thrust of his statement of reasons relates to the use of this road by residents of the community and their alleged right to keep it open. The statement of reasons was accompanied by histories of the road compiled by some of the residents. The main points are as follows:

The old road, which has now been closed by BLM, was the original pack trail and wagon road through the mining settlement of Logtown

<sup>1</sup> These conditions were set forth in a letter of Aug. 20, 1975, from Donald J. Schofield, Medford District Manager, to George Thornton of the Oregon State Highway Division.

to the mines on Jackass Creek when Oregon was still a territory in the early 1850's.<sup>2</sup> The land encompassing a portion of the road was patented to a homesteader, John McKee, on Dec. 13, 1878. Although the property has changed owners, the road across this land has always been acknowledged as a public road and was traveled all year as a shortcut between Forest Creek road and Highway 238. The present county road was built in 1871, and prior to that time, the old road was the only road to the mines and ranches on Jackass Creek, as it was known then.<sup>3</sup> Early maps submitted by appellant show the road. The creek crossing is in almost the exact location it was 100 years ago.

During the 1920's, 1930's, and 1940's the area was within the boundaries of the Rogue River National Forest. Maps made during this period show the road as a secondary public road. Some residents can remember the county grader grading the road.

In 1941, Stearns and Owens dredge-mined along the creek, but they continuously maintained a crossing and restored the area when they had completed their work.

In 1953 the State Highway Department purchased the resource rights to an unpatented mining

claim from W. W. and Gertrude Winningham for a gravel stockpile site. A rock crusher was set up and put into operation. The creek crossing was reconstructed and the road across the flat was leveled and graded straight across to intersect with Highway 238.<sup>4</sup> In addition to the highway gravel trucks, school buses, logging trucks, stockmen, residents and utility companies' service crews traveled the road regularly. The road is said to have been used as a school bus route from 1938 until about 1972, when the route was changed.

Administration of the Rogue River National Forest was terminated in 1954 and the land in question came under the jurisdiction of the BLM. Public use of the road continued.

In 1958 residents petitioned the State Highway Department to install a culvert in the creek crossing. The State responded that it had no authority to allow public use of the road. The County Court also refused them on the ground that funds were lacking.

In 1967 Paul Miller bought the deeded land which included part of the old McKee homestead and the site of old Logtown. He had it subdivided and set aside a 60-foot right-of-way, 600 feet long the existing road for public use. He named it Longanecker Road and he offered to donate the 60-foot right-of-way to the County, if it would agree to maintain it and straighten it to meet his legal survey. On

<sup>2</sup> It appears that because of realignment the original road may not have been in the exact location as the haul road along its entire length but was in close proximity to it. However, both segments have been closed and access barred by BLM order.

<sup>3</sup> Presumably Jackass Creek was later named Poorman's Creek, but this is not absolutely clear.

<sup>4</sup> This is the haul road as it existed at the time the controversy originated.

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Nov. 26, 1967, John M. Black and other residents petitioned the County Court requesting that the entire length of the road, approximately 1,000 feet, be accepted into the permanent County Road system and improved for general use. The County Engineer responded that the County would not, or could not, maintain two branches of Forest Creek road.

During the next 7 years traffic increased on the road to such an extent that the State Highway Department erected a stop sign at the intersection of the road and Highway 238.

Two houses were built on Longanecker Road. Mr. Willard, whose house is within 400 feet of the creek crossing, complained to the State Highway Department about the noise and dust created by the traffic using the road.

In Oct. 1974 it was learned that the State Highway Department planned to install a gate across the end of Longanecker Road on the boundary of the gravel site to close the road to through traffic.

The residents filed a protest against the closing of the road with George Thornton, Highway Division Engineer in Medford, who advised them to petition the County Board of Commissioners. At this time, the petition signed by 38 residents was filed with the County Board of Commissioners seeking to have the road declared a "way of necessity." The petition was denied.

The gate was locked on Jan. 13, 1975, with "Road Closed" signs

erected on each side. That night Willard reported to the Sheriff's office that the gate had been vandalized. The next morning it was discovered that the gate had been sawed off with a chain saw and tossed over the bank. That day several residents driving across the road had flat tires on their vehicles from roofing nails on the road. Subsequently, highway crews filled the entrance to the road with a 6-foot bank of soil, effectively closing the road.

Another petition signed by more than 300 persons was filed with the Board of County Commissioners in Mar. 1975. Commissioner Tom Moore organized a conference-type hearing on Apr. 2, 1975, with representatives of the BLM, State Highway division, and Jackson County. Thornton announced that the State was relinquishing the portion of the right-of-way which encompassed the road and would remove the barrier if directed to do so by the BLM.

The Chief, Branch of Lands and Mineral Operations, BLM, sought the Solicitor's opinion concerning the effect of the relinquishment. The Solicitor, by letter dated July 3, 1975, responded that if the BLM accepts the relinquishment and leaves the road usable, it assumes responsibility for the road which would include sufficient maintenance to meet BLM safety standards. Liability would then result, he said. The Solicitor added that if it is determined to be in the public interest to have the road open but

not maintained, the road should be clearly signed to the effect that it is dangerous and not maintained. He commented that this was not practical since the road would require regular maintenance because of flood damage from Poorman's Creek.

Permission was obtained from the County Director of Public Works to open the original part of the road up the hill on the County right-of-way, by-passing the barrier. This by-pass was used throughout the summer of 1975, despite attempts by Willard to prevent the use. In Sept., the BLM District Manager requested the State to block the by-pass with another barrier of soil, thereby closing it to through traffic.

Appellant claims that the State or the BLM was required to give public notice of the closing of the road.

Appellant states that the closing of the road violates 43 CFR 2801.1-5(i), which provides that upon revocation or termination of a right-of-way the land shall be restored to its original condition. Appellant urges that maps prove that this was a well-traveled road at the time the State Highway Department realigned it. Also included with the appeal are "poll sheets", which are statements from the residents verifying that the road was in existence in the early 1900's.

Appellant points to practical considerations such as convenience, safety, fire protection and fuel conservation as reasons for keeping the

road open. It is also asserted that the road closure channels trade away from the local stores at Ruch and Applegate. He emphasizes that no financial assistance is needed for maintaining the road.

Regarding appellant's contention that the State should have given notice prior to closing the road, this matter is one of State law and not within the jurisdiction of this Board. As to whether BLM was required to give notice, there is nothing in the regulations providing that the public must be put on notice when use of a road, which is part of a State's right-of-way over Federal land, is to be terminated in connection with the partial relinquishment of the right-of-way.

Under 43 CFR 2801.1-5(i) BLM may require that the road used in conjunction with the State's material site be blocked as a prerequisite to accepting the State's partial relinquishment of its right-of-way. If, however, it can be shown that the road is legally a public road and not merely an access road from which the State hauled gravel from its material site, the Bureau has no authority to interdict its use.

The Act of July 26, 1866, R.S. § 2477, 43 U.S.C. § 932 (1970), provides a possible means for this road to be a public highway. This section grants the right-of-way for the construction of highways over public lands not reserved for public uses. Under 43 U.S.C. § 932 (1970), it is necessary, in order that a road become a public highway, that it be established in accordance with the

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law of the state in which it is located. *Ball v. Stephens*, 68 Cal. App. 2d 843, 158 P.2d 207, 209 (1945). Referring to the law of the State, OR. REV. STAT. § 368.546 provides the following regarding grants:

\* \* \* Whenever any person owning lands in any county, and not within the limits of an incorporated city or town, has dedicated or, after August 9, 1961, shall forever dedicate, to the use of the public for road purposes all or any portion of said land, by:

(1) Presenting to the county court a good and sufficient deed properly executed forever dedicating the land and granting such public road easement, and the deed has been or is accepted by the county court and placed of record; or

(2) Presenting to the county court for filing, as provided by law, any map or plat of any town, addition or subdivision dedicating to the use of the public for road purposes the highways, roads, streets, alleys or other public ways, shown thereon, and the map or plat has been or is approved and accepted by the county court or other public official and placed of record; each public road easement so dedicated shall be a public highway and road and shall be open to public use and travel.

[1961 c.556 § 11.]

OR. REV. STAT. § 368.555, specifically dealing with a right-of-way over United States public land, provides:

\* \* \* The county courts in their respective counties may accept the grant of rights of way for the construction of highways over public lands of the United States. Acceptance shall be by resolution of the court spread upon the records of its proceedings. *This section does not invalidate the acceptance of such grant by general public use and enjoyment.* [Italics added.] [Amended by 1967 c.256 § 1.]

This provision, then, sanctions use and enjoyment by the public as a means of acceptance of the Federal Government's grant under 43 U.S.C. § 932 (1970). Likewise, a review of Oregon case law reveals that Oregon courts have, for many years, deemed public user of a road to be a proper mode of accepting offers of a right-of-way for the construction of a highway over public lands. In *Montgomery v. Somers*, 50 Or. 259, 90 P. 674, 677 (1907), the Supreme Court of Oregon stated:

The act of Congress [43 U.S.C. § 932] referred to by the court is an express dedication of a right of way, and an acceptance of the grant, while the land is a part of the public domain, may be effected by public user alone, without any action on the part of the public highway authorities. When an acceptance thereof has once been made, the highway is legally established, and is thereafter a public easement upon the land, and subsequent entrymen and claimants take subject to such easement. *Wallowa County v. Wade*, 43 Or. 253; 72 Pac. 793; *McRose v. Bottyér*, 81 Cal. 122, 22 Pac. 393; *Smith v. Mitchell*, 21 Wash. 536, 58 Pac. 667, 75 Am. St. Rep. 858.

Regarding the duration of the user the Court explained at 677:

\* \* \* When the general public enter upon public lands not reserved for public use, for the purpose of appropriating a definite portion thereof for a highway, or to lay out or construct a highway for public use, they do so with the consent of the owner previously given by express dedication. Under such circumstances, the duration of the user is not material, so long as it is sufficient to clearly assert an intention on the part of the general public to make such appropriation; \* \* \*.

Appellant has presented evidence of use since the early 1900's. The 1908 and 1954 U.S. Geological Survey maps, the 1932 Metsker map and the 1952 State Highway Department aerial survey photo, all show the road and bolster appellant's contention that the road has been recognized as a public one for many years. BLM denies that the road has a long history of use. It claims that the old *original* mining road is not being used and that the haul road's use only dates back to the State's material site in the 1950's. In light of the Court's interpretation of duration, in *Montgomery v. Somers, supra*, BLM's argument that the road does not have a long history of use loses significance. It is interesting to note that the State did acknowledge the use of the road by the public when it erected a traffic stop sign at the intersection of the road and State Highway 238. Also, the county has used the road as a bus route.

43 U.S.C. § 932 (1970) applies only to lands that are not reserved for public use, and there is nothing in the file to indicate that the land in question is presently so reserved. The land is O & C revested land and the Act of June 9, 1916, 39 Stat. 218, 219, sec. 2 states in pertinent part that:

\* \* \* all the general laws of the United States now existing or hereafter enacted relating to the granting of rights of way over or permits for the use of public lands shall be applicable to all lands title to which is revested in the United States under the provisions of this Act. \* \* \*

Therefore, 43 U.S.C. § 932 (1970) is applicable to O & C land.

Ordinarily, no application need be filed under sec. 932 as no action on the part of the Government is necessary. 43 CFR 2822.1-1; *United States v. 9,947.71 Acres of Land*, 220 F. Supp. 328 (D. Nev. 1963). However a right-of-way for a highway over revested land is currently an exception to this general rule, and now an applicant must file an application and comply with 43 CFR 2822.1-2 if he wishes the route to become a public highway under sec. 932. This regulation reads in part as follows:

(a) *Showing Required.* \* \* \* when a right-of-way is desired for the construction of a highway under R.S. 2477 over the Revested and Reconveyed Lands, an application should be made in accordance with § 2802.1. Such application should be accompanied by a map, drawn on tracing linen, with two print copies thereof, showing the location of the proposed highway with relation to the smallest legal subdivisions of the lands affected.

\* \* \* \* \*

(c) *Revested and Reconveyed Lands.* Where Revested and Reconveyed Lands are involved, no rights to establish or construct the highway will be acquired by reason of the filing of such application unless and until the authorized officer of the Bureau of Land Management shall grant permission to construct the highway, subject to such terms and conditions as he deems necessary for the adequate protection and utilization of the lands, and for the maintenance of the objectives of the act of Aug. 28, 1937 (50 Stat. 874; 43 U.S.C. § 1181a).

It is noteworthy that the regulation which requires the filing of an application to acquire a right-of-

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way pursuant to 43 U.S.C. § 932 (1970) was first promulgated by publication in the *Federal Register* at page 2506 on Apr. 12, 1957, as an amendment of 43 CFR 244.59 (since recodified). Insofar as we can ascertain, prior to that date such a right-of-way could be acquired on revested and reconveyed lands in the same manner as on any other unreserved public domain, *i.e.*, by public acceptance and use.

The question thus arises whether the public had already acquired a right-of-way over this road prior to Apr. 12, 1957. The evidence at hand suggests forcefully that it had done so. The alternative question is whether there is any current bar to the filing of an application to acquire the right-of-way in accordance with 43 CFR 2822.1-2. The record reveals repeated assertions by the Bureau of Land Management to the effect that it has no objection whatever to the continued use of the road by the public, the Bureau's concern being centered exclusively on its liability for maintenance of the road and its exposure to tort liability.<sup>5</sup>

We recognize that the question of whether a road is a public highway is determined by the law of the State in which the public land is located. Therefore, this Department has considered State courts to be the proper forum to decide ulti-

mately whether a public highway under 43 U.S.C. § 932 (1970) has been created under State law and to adjudicate the respective rights of interested parties. *Alfred E. Koenig*, A-30139 (Nov. 25, 1964); *Herb Penrose*, A-29507 (July 26, 1963). Were this a case of a dispute between private citizens without the active involvement of any officer or agency of this Department, the resolution of the question would not be a matter of administrative concern, and we would be constrained to refer the appellant to his State court system.

But where, as in this case, the BLM has ordered the road closed to public use, and has dismissed a protest of that action, and the record shows that both the closure and the dismissal of the protest were ordered by the Bureau without any consideration having been given to the possible implications of the statute, it is appropriate that the Bureau review the propriety of its action for its own purposes and to ascertain whether it should either alter its position or receive and adjudicate an application under 43 CFR 2822.1-2.

In view of the fact that the Oregon State Office did not consider the implications of sec. 932 in making its decision, that decision will be set aside and the case remanded with instructions to consider first whether a public way has already been established under the statute and, if not, to afford the appellant

<sup>5</sup> We are unable to identify such liability on a public right-of-way which has been created by statute.

and/or other applicants to file an application to establish such a public way in accordance with the regulation. A negative determination of either or both issues will be subject to a further appeal to this Board.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Decision appealed from is set aside and

the case is remanded to the Oregon State Office for further action consistent with this opinion.

EDWARD W. STUEBING,  
*Administrative Judge.*

WE CONCUR:

DOUGLAS E. HENRIQUES,  
*Administrative Judge.*

FREDERICK FISHMAN,  
*Administrative Judge.*

September 13, 1976

**CANTERBURY COAL COMPANY****6 IBMA 276***Decided September 13, 1976*

Appeal by Canterbury Coal Company from a decision of Administrative Law Judge Paul Merlin, dated May 16, 1975, in Docket No. M 74-104, in which the Judge denied Canterbury's Petition for Modification of the application of 30 CFR 75.1405 to its David Mine pursuant to sec. 301(c) of the Federal Coal Mine Health and Safety Act of 1969.

*Affirmed.*

**1. Federal Coal Mine Health and Safety Act of 1969: Modification of Application of Mandatory Safety Standards: Automatic Couplers.**

Where the evidence of record shows that a link aligner may not always be immediately available, as opposed to the ever-present automatic coupler, presenting an opportunity for a miner to position himself between mine cars, to perform a coupling, a Petition for Modification to permit the use of link aligners must be denied as not providing the same degree of safety as automatic couplers in all respects and at all times.

**2. Federal Coal Mine Health and Safety Act of 1969: Modification of Application of Mandatory Safety Standards: Automatic Couplers**

Where the proponent of a Petition for Modification of the application of 30 CFR 75.1405 is unable to rebut evidence produced by MESA based upon measurements and calculations showing automatic couplers to be suitable for use in the subject mine with no diminution of safety to the miners, the Petition will be denied.

**APPEARANCES:** Henry McC. Ingram, Esq., and Philip C. Wolf, Esq., for appellant, Canterbury Coal Company; Thomas A. Mascolino, Esq., Assistant Solicitor, Robert J. Araujo, Esq., and Leo J. McGinn, Esq., Trial Attorneys, for appellee, Mining Enforcement and Safety Administration.

**OPINION BY CHIEF ADMINISTRATIVE JUDGE DOANE**

**INTERIOR BOARD OF MINE OPERATIONS APPEALS**

*Factual and Procedural Background*

This proceeding commenced when Canterbury Coal Company (Canterbury) filed a Petition for Modification of the application of 30 CFR 75.1405 to the haulage system in its David Mine located in Avonmore, Pennsylvania. The provisions of 30 CFR 75.1405 (sec. 314(f) of the Federal Coal Mine Health and Safety Act of 1969) are as follows:

All haulage equipment acquired by an operator of a coal mine on or after Mar. 30, 1971, shall be equipped with automatic couplers which couple by impact and uncouple without the necessity of persons going between the ends of such equipment. All haulage equipment without automatic couplers in use in a mine on Mar. 30, 1970, shall also be so equipped within 4 years after Mar. 30, 1970.

Canterbury's Petition called for the use of a link-pin coupling system in which links would be aligned for coupling by use of a hand-held link aligner and a pin dropped or removed by means of the same de-

vice. As grounds for the Petition, Canterbury contended that its system is as safe as that required by 30 CFR 75.1405 because use of the link aligner eliminates the necessity of mine personnel going between the ends of the equipment during coupling and uncoupling operations. Further, Canterbury contended that due to the fact that it uses equipment manufactured by five different companies, the necessity of using open-ended flat cars (with no place available to attach the automatic coupler releasing lever), and the number of small radius turns in its haulage system, the use of automatic couplers would result in a diminution of safety.

In an amended answer, the Mining Enforcement and Safety Administration (MESA) stated that it opposed approval of the proposed system because it did not guarantee the same measure of protection as 30 CFR 75.1405. As grounds for its opposition, MESA cited the investigation it conducted in accordance with the provisions of sec. 301(c) of the Act, which resulted in the recommendation that the proposal not be accepted as it did not eliminate the need for miners to go between mine ears for coupling and uncoupling.

After holding a hearing in Pittsburgh, Pennsylvania, on Mar. 19 and 20, 1975, the Administrative Law Judge (Judge) issued his decision in which he held that the Petition should be denied with respect to all equipment involved because Canterbury's proposal would not at all times guarantee the same

measure of safety as automatic couplers and because the use of automatic couplers will not result in a diminution of safety.

### *Issues Presented*

#### A.

Whether the Judge erred in concluding that the proposed use of a hand-held link aligner is not as safe as the use of automatic couplers in the David Mine.

#### B.

Whether the Judge erred in concluding that the use of automatic couplers in the instant case will not result in a diminution of safety to the miners.

### *Discussion*

#### A.

One way of securing approval of a Petition for Modification is for an operator to establish that his alternative is as safe or safer than the requirements of the mandatory safety standard the application of which is sought to be modified. In *Kentland-Elkhorn Coal Corporation—Eastern Coal Corporation*, 4 IBMA 130, 82 I.D. 195, 1974-1975 OSHD par. 19,570 (1975), the Board held that the petitioner must establish that the alternative method must be shown to be as safe as or safer than the required method in all respects and at all times.

In his decision, the Judge found that hazardous situations might occur when the link aligner would

not be present when needed and the miner might step between the mine cars to perform a coupling. Further, he found that if a miner stood on top of a mine car to perform a coupling, he could topple over. Based upon the above findings, the Judge concluded that Canterbury's alternative was not as safe as the mandatory standard.

Canterbury challenged the Judge's finding with respect to the absence of the link aligner on two grounds. The first is the testimony of the motorman that he would never couple or uncouple mine cars without a link aligner. The second is the testimony of a MESA witness concerning a demonstration of the alternative staged for him during his investigation of the alternative. During this demonstration, a link aligner could not be found on the motor closest to where the coupling was being performed. The pertinent testimony of the witness was:

Q. Do you know, whether or not, there were two hand link aligners on the other motor?

A. Yes.

Q. There were?

A. Yes, I didn't see the two, but they said there were two on the other motor.

[1] The Board is of the opinion that Canterbury's arguments concerning the Judge's findings of fact are unpersuasive. With respect to the first, while the testifying motorman might well do as he said at all times, we must always consider what might occur if someone else were performing the coupling. Another miner, substituting for the regular motorman, might not be so

conscientious or might be confronted with an emergency situation and perform a coupling or uncoupling without thinking to use the link aligner. Further, as seen in the demonstration depicted above, if the link aligner were not immediately available, even though only a short distance away,<sup>1</sup> a substitute might be inclined to perform a coupling without employing the link aligner. Such is not the case with automatic couplers which couple on impact. An automatic coupler is always available and, except for the possibility that it might require positioning within its gathering range, does not require human input to perform a coupling. Accordingly, neither of the situations found possible to occur by the Judge would arise with the use of automatic couplers.

Our review of the record indicates that the Judge's findings of fact are supported by the substantial evidence of record, and, considered in light of the Board's holding in *Kentland-Elkhorn-Eastern, supra*, Canterbury's alternative has not been shown to be as safe or safer than automatic couplers in all respects and at all times. Accordingly, the Petition cannot be granted on this ground.

#### B.

Another way of securing approval is a showing by the operator

<sup>1</sup> The above-quoted testimony does not conclusively establish that two link aligners were present on the other motor as the MESA witness did not actually see both.

that the application of the mandatory standard will result in a diminution of safety to the miners, and Canterbury challenges the Judge's conclusion that the use of automatic couplers will not result in a diminution of safety to the miners. Canterbury alleges that the use of a drawbar on the rubber-rail cars, which operate both on track and off track, and the rail cars, which operate on track only, carrying long loads was required to prevent derailment and that the Judge's position that an exception had to be made for such equipment militates against the above conclusion. Canterbury also alleges that its use of mine cars made by different manufacturers and with different bumper heights makes installation of a standard coupler difficult, if not impossible.

[2] In the only previous case involving a Petition for Modification of the application of 30 CFR 75.1405, *Cannelton Industries, Inc.*, 4 IBMA 74, 82 I.D. 102, 1974-1975 OSHD par. 19,436 (1975), the Board held that due to the physical modifications of the subject mine which would be required by the application of the automatic coupler provision and the increased prospect of danger resulting therefrom, implementation of the mandatory standard would result in a diminution of safety. In that case, the use of automatic couplers would require the widening of a mine shaft entailing blasting and its concomitant hazards and problems due to replacement of structural support and also would require an increase in the radius of a number of curves

increasing the chances of roof falls. In the instant case, the only contentions with respect to diminution are that: (1) the different brands of cars on which the couplers would be installed lack a standard bumper height and make such installation difficult; (2) the long loads referred to above require the use of drawbars; and (3) some curves must be straightened in order to reduce the possibility of derailment. In reply to these contentions, MESA presented evidence that it was possible to modify the different brands of cars to accept a standard brand of coupler; that an exception could be made for long loads under certain circumstances; and that, on the basis of calculations made by its engineer, no curves would require widening. In reaching his conclusion, with respect to diminution of safety, the Judge accepted the MESA evidence because the MESA engineer based his opinion on measurements and calculations made therefrom, while Canterbury's witnesses made no measurements or calculations to support their opinion that automatic couplers were unsuitable for use and had never attempted to use such couplers in the mine. Our review of the record reveals that the Judge's findings of fact and conclusions of law are supported by the substantial evidence of record. Accordingly, we must affirm his conclusion that the use of automatic couplers will not result in a diminution of safety to the miners.

With respect to Canterbury's contention that the Judge made an exception for long loads which mili-

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tates against the above conclusion, a careful reading of his decision reveals that the Judge (1) acknowledged that the MESA engineer would grant an exception to the requirement for long loads as long as special supervision was provided, and (2) stated that, due to the special supervision provided, the exception from the requirement for long loads would not constitute a diminution of safety. Nowhere in his decision, especially in his conclusions of law and order, does the Judge grant an exception for long loads or rubber-rail cars.

On May 13, 1976, counsel for Canterbury filed a motion to stay this proceeding pending a decision in *Oneida Mining Company, et al.*, IBMA 76-78, a case involving a Petition for Modification of the application of 30 CFR 75.1405 with respect to rubber-rail cars only. This motion was based on the theory that there was a great similarity of issues and that a decision in Canterbury might be dispositive of *Oneida* or vice versa. MESA filed a statement in opposition to this motion.

The Board is of the opinion that the factual differences of these two cases: (*Canterbury* involves both on track and on track-off track cars whereas *Oneida* involves only on track-off track cars) destroy the merit of staying the instant proceeding. Accordingly, we will deny Canterbury's motion.

Further, on Aug. 14, 1975, the Board stayed the enforcement of an outstanding sec. 104(b) order of

withdrawal issued against Canterbury pending resolution of the merits of this case. In light of our disposition here on the merits, such stay must be dissolved.

## ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that:

1. the Judge's decision in the above-captioned case IS AFFIRMED;
2. Canterbury's motion to stay this proceeding IS DENIED; and
3. the Board's stay of enforcement, granted Aug. 14, 1975, IS TERMINATED.

DAVID DOANE,

*Chief Administrative Judge.*

WE CONCUR:

HOWARD J. SCHELLENBERG, JR.,  
*Administrative Judge.*

LOUIS E. STRIEGEL,  
*Member of the Board.*

IN THE MATTER OF KENNECOTT  
COPPER CORPORATION  
(BINGHAM MINE)

6 IBMA 288

Decided September 15, 1976

Application for Review.

1. Federal Metal and Nonmetallic  
Mine Safety Act: Imminent Danger  
Withdrawal Orders: Dismissal

Allegations of invalidity ab initio with respect to an imminent danger withdrawal order constitute a legally sufficient claim for relief under secs. 9 and 11 of the Act. 30 U.S.C. §§ 728, 730 (1970).

## **2. Federal Metal and Nonmetallic Mine Safety Act: Imminent Danger Withdrawal Orders: Mootness**

Abatement of a condition or practice which gave rise to a sec. 8(a) imminent danger withdrawal order does not render moot an application for review and annulment of such order under secs. 9 and 11 of the Act. 30 U.S.C. §§ 727(a), 728, 730 (1970).

**APPEARANCES:** James B. Lee, Esq., and Kent W. Winterholler, Esq., for applicant, Kennecott Copper Corp.; David Barbour, Esq., Trial Attorney for respondent, Mining Enforcement and Safety Administration.

### **MEMORANDUM OPINION AND ORDER**

#### **INTERIOR BOARD OF MINE OPERATIONS APPEALS**

Pursuant to sec. 9(a) of the Federal Metal and Nonmetallic Mine Safety Act of 1966, *as amended*, Kennecott Copper Corporation (Kennecott) has applied for review and annulment of an imminent danger withdrawal order issued under section 8(a) of the Act. 30 U.S.C. §§ 728(a), 727(a) (1970). In connection with its application, Kennecott has petitioned the Board to exercise its discretion under 43 CFR 4.500 (b) and (c) and order an adjudicatory hearing. Respondent, Mining Enforcement and

Safety Administration (MESA), recognizes the Board's discretion to order such a hearing, but contends nevertheless that Kennecott's petition should be denied and moves for dismissal of the subject application for review, arguing that Kennecott's claim for relief became moot upon the termination of the subject withdrawal order due to abatement.

This case is now before the Board for rulings on Kennecott's petition for an adjudicatory hearing and on MESA's motion to dismiss.

At the outset, we note for the record that in 1975 there was a significant alteration of the review provisions of the Act. As originally enacted in 1966, the Act provided for apparently informal review by the Secretary under sec. 9 and formal review replete with a hearing on the record under sec. 11. 30 U.S.C. §§ 728, 730 (1970). Jurisdiction to make a final decision for the Secretary under sec. 9 was delegated to this Board. 43 CFR 4.1, 4.500 (b) and (c). Jurisdiction under section 11 was lodged in the Federal Metal and Nonmetallic Mine Safety Board of Review which was established as an independent agency. 30 U.S.C. § 729(a) (1970). The Board of Review was not bound by findings of the Secretary and an applicant for review was entitled to bypass the Secretary and proceed directly to that Board.

Last year, the Congress abolished the Board of Review and transferred its powers and functions to the Secretary. Act of June 27, 1975 (89 Stat. 226). In turn, the Secre-

## (BINGHAM MINE)

September 15, 1976

tary delegated those powers and functions to the Board of Mine Operations Appeals, 43 CFR 4.1, 4.500, but he has not yet promulgated procedural regulations to implement that delegation.

Because of the lack of implementing regulations explaining how to invoke our sec. 11 review powers and in order to avoid duplicative proceedings, we are treating Kennecott's application for review and annulment as if it had been filed under sec. 11 as well as section 9.

Viewed from that perspective, there can be no question that we have the power to order a formal adjudicative hearing, and further, that MESA's mootness argument is without merit. The subject withdrawal order is of typically short duration and capable of repetition. If the question of its validity were declared moot, such order and others of like kind would escape review entirely. Disputes involving such orders fall within a long-recognized exception to the mootness doctrine in a well-established line of federal cases which are not significantly distinguishable from the case at hand. *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911); *Eastern Associated Coal Corp. v. Interior Board of Mine Operations Appeals*, 491 F.2d 277 (4th Cir. 1974); and *Freeman Coal Mining Co. v. Interior Board of Mine Operations Appeals*, 504 F.2d 741 (7th Cir. 1974). We note

as well that the Act itself does not expressly bar post abatement review of the validity ab initio of a sec. 8(a) withdrawal order and the Secretary's regulations appear to contemplate such review. 43 CFR 4.662.

## ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED:

1. that MESA's motion to dismiss IS DENIED;

2. that Kennecott's petition for an adjudicatory hearing to be held in Salt Lake City, Utah, IS GRANTED;

3. that this case BE REFERRED to the Chief Administrative Law Judge for assignment to an Administrative Law Judge TO CONDUCT a hearing in accordance with 5 U.S.C. § 554 (1970) and TO ISSUE a written recommended decision and SERVE such decision upon the parties by certified mail return—receipt requested; and

4. that, upon the conclusion of the proceeding before him, the Administrative Law Judge SHALL CERTIFY the record made and SHALL TRANSMIT the same to the Board.

IT IS FURTHER ORDERED that each party MAY FILE with the Board specific exceptions to the recommended decision, together with a supporting brief, on or be-

fore 30 days from the date of receipt thereof.

DAVID DOANE,  
*Chief Administrative Judge.*

HOWARD J.  
SCHELLENBERG, JR.,  
*Administrative Judge.*

LOUIS E. STRIEGEL,  
*Member of the Board.*

# MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY

26 IBLA 393

*Decided September 16, 1976*

Appeal from a decision of the Idaho State Office, Bureau of Land Management, establishing the charge for use and occupancy of communication site right-of-way I-5769.

Set aside and remanded.

1. Appraisals—Communication Sites—Hearings—Rights-of-Way: Act of March 4, 1911—Rules of Practice: Hearings

Under 43 U.S.C. § 961 (1970) and 43 CFR 2802.1-7(a), an applicant has no right to a hearing in connection with original charges for use and occupancy of a communication site, and a hearing pursuant to a request under 43 CFR 4.415 will not be granted where applicant fails to make specific allegations or offer specific proof to show in what factors a Departmental appraisal is in error.

2. Appraisals—Communication Sites—Rights-of-Way: Act of March 4, 1911

Without convincing evidence that charges prescribed under 43 U.S.C. § 961 (1970) and 43 CFR 2802.1-7 for use and occupancy of a communication site are excessive, charges properly prescribed by an authorized officer will be sustained on appeal.

3. Appraisals—Communication Sites—Rights-of-Way: Act of March 4, 1911

Department regulation 43 CFR 2802.1-7 contemplates that a charge will be initially established for the entire term of the grant of a communication site right-of-way.

APPEARANCES: Joseph C. O'Neil and Laura F. Davidson, Esqs., Denver, Colorado, for appellant; Frederick N. Ferguson and Bruce P. Moore, Esqs., Office of the Solicitor, Department of the Interior, Washington, D.C., for the Department.

OPINION BY ADMINISTRATIVE JUDGE GOSS

## INTERIOR BOARD OF LAND APPEALS

The Mountain States Telephone and Telegraph Company appeals from a decision of the Idaho State Office, Bureau of Land Management [BLM], dated May 16, 1973, in which it is stated in part:

The fair market rental for use of [communication site I-5769] has been determined to be \$2,675 for a five-year period. The rental for the first five-year period is now due and payable.

Appellant requests a hearing before an Administrative Law Judge pursuant to 43 CFR 4.415 and asserts the decision is "contrary to and in

September 16, 1976

conflict with the facts and is arbitrary and capricious."

Appellant had an existing microwave site on Squaw Butte, 1 mile south of I-5769 and requested permission to increase the equipment capacity on such site. BLM refused because an increased antenna height would interfere with coverage from a BLM lookout. Therefore, appellant requested the new site, I-5769, the ninth communication site on Squaw Butte. The old site, which is nearly identical in size and setting to I-5769, had an annual charge of \$92 per year. The old site has been relinquished and the use transferred to the new site. The new rental is based upon a BLM appraisal report.

[1, 2] Under 43 CFR 2802.1-7 (a) an applicant has no right to a hearing in connection with initial charges. The regulation provides in part:

(a) Except as provided in paragraphs (b) and (c) of this section,<sup>[1]</sup> the charge for use and occupancy of lands under the regulations of this part will be the fair market value of the permit, right-of-way, or easement, as determined by appraisal by the authorized officer. Periodic payments or a lump-sum payment, both payable in advance, will be required at the discretion of such officer \* \* \*. [Italics added.]

There has been no specific allegation or offer of specific proof to show in what factors the BLM ap-

praisal of the new site is in error. The fact that the charges are higher than previously established for appellant's nearby site and for which the new site is substituted, is not determinative. Therefore, appellant's request for hearing should be and is denied. *Of. Kathleen M. Smyth*, 8 IBLA 425 (1972). Without convincing evidence that use and occupancy charges are excessive, charges properly prescribed by an authorized officer will be sustained on appeal. *Western Arizona CATV*, 15 IBLA 259, 263-64 (1974).

[3] The decision herein appealed, however, is incomplete. Appellant had requested a grant for a 50-year term, the maximum period permitted under the statute. While the appraisal assumes a grant for a 10-year term,<sup>2</sup> neither the term of the grant nor the charge for the entire term is set forth in the decision appealed. Sec. 2802.1-7(a) contemplates that the charge "will be the fair market value of the \* \* \* right-of-way." The charge is thus to be set for the entire grant,<sup>3</sup> with either periodic payments or a lump-sum payment, at the discretion of the authorized officer. The established charge may be reviewed periodically and revised under sec.

<sup>1</sup> It is not clear that the Appraiser or the Reviewing Appraiser is an "authorized officer" who, under sec. 2802.1-7(a), would have authority to establish the term and charge for the grant.

<sup>2</sup> The BLM Manual includes a sample right-of-way decision which provides for an annual rental during the entire term of the grant, payable "[e]very five-years in advance." BLM Manual 2802, Illustration 1, Page 1 (.15).

<sup>3</sup> The exceptions are not applicable here.

2802.1-7(e).<sup>4</sup> A method often used to establish such "fair market value of the \* \* \* right-of-way" is to measure the specific term and other features of the right-of-way grant against leases or grants for comparable sites, including a comparison of charges over the entire terms. On appeal, this information is essential for the Board in its review of the propriety of the charge compared to charges for similar sites, including the neighboring sites on Squaw Butte. For these reasons, the case should be remanded for clarification by the authorized officer.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case remanded.

JOSEPH W. GOSS,  
*Administrative Judge.*

I CONCUR:

DOUGLAS E. HENRIQUES,  
*Administrative Judge.*

**ADMINISTRATIVE JUDGE THOMPSON CONCURRING IN PART, DISSENTING IN PART:**

To the extent the majority opinion rejects appellant's request for a hearing and the reasons therefor I concur. However, I must dissent from that part of the decision which sets aside the Bureau's Idaho State Office decision and remands the case for further consideration of the appraisal. It is very difficult

to understand the majority's position that this Board has insufficient information upon which to review the propriety of the charge compared to charges for similar sites. The rationale for this conclusion appears to be the failure in the decision to set forth the term of the right-of-way and the charge for the entire term. While the decision appealed from is not a model for furnishing information and only gives the annual rental and the amount of the 5-year lump-sum payment, I cannot see that appellant has suffered any prejudice. It would certainly be proper, and indeed preferable, for the Bureau to indicate in a decision requiring advance rental what the proposed term of the grant will be even though its final decision on the application would not issue until the rental is paid. In the absence of some objection by appellant—with supporting reasons, that such information is essential in appealing the case on the proposed charges—I believe this is a harmless omission, and not a sufficient reason for setting aside the decision.<sup>5</sup>

It was proper for the Bureau Office to give notice of the annual rental or lump-sum payment. The majority opinion seems to imply that the rental proposed does not establish the value of the right-of-way. The appraisal report, at p. 1, states that the appraisal is to "esti-

<sup>5</sup> In any event, since the appraisal report reflected the proposed term and appellant has undoubtedly seen the report, it was aware of the proposed term and could have objected to it. It has not done so, nor has it tendered any offer of evidence to show error in the appraisal.

<sup>4</sup> *American Telephone and Telegraph Company*, 25 IBLA 341 (1976).

mate the fair annual rental for the rights being granted, under a 10-year grant. The appraisal will serve as the basis for establishing the lump-sum payment for 5-years rent in advance." The report, at pp. 7-9, indicates that one of the valuation factors in comparing this site with other sites is the tenure of the lease, and specifically compares the 10-year proposed grant with the terms of the leases selected as most comparable to this site. It is obvious, therefore, that the proposed 10-year term for the grant was a basis for making the comparison and in determining the proper annual rental charge. To set aside the decision and remand this case to reexamine the appraisal for the reasons given appears to be an unnecessary and unwarranted exercise to which I cannot ascribe.

JOAN B. THOMPSON,  
*Administrative Judge.*

## OLD BEN COAL COMPANY

### 6 IBMA 294

Decided *September 16, 1976*

Appeal by the Mining Enforcement and Safety Administration from a decision by Administrative Law Judge Malcolm P. Littlefield in Docket No. VINC 72-48 in which he vacated a notice of violation and a related order of withdrawal that had been issued under sec. 104(b) of the Federal Coal Mine Health and Safety Act of 1969.

Set aside in part and affirmed in part.

### 1. Federal Coal Mine Health and Safety Act of 1969: Applications for Review: Pleading

Where an applicant has filed an application for review containing an incomplete request for relief, but later makes clear all the specifics of the relief desired *without objection*, a responding party shall be deemed on appeal to have waived any claim of error below based upon an Administrative Law Judge's decision to grant the portion of the relief ultimately requested but not mentioned in such application. 43 CFR 4.532(a)(1).

### 2. Federal Coal Mine Health and Safety Act of 1969: Notices of Violation: Reasonableness of Time

In a review proceeding, an Administrative Law Judge abuses his discretion under sec. 105(b) by vacating a notice of violation on the ground that the time originally fixed therein is unreasonably short because such action is inconsistent with the Secretary's statutory obligation under sec. 109 to assess a civil penalty for every violation of the mandatory health or safety standards. 30 U.S.C. § 815(b) (1970).

### 3. Federal Coal Mine Health and Safety Act of 1969: Abatement: Withdrawal Orders

When an inspector finds that an operator has failed to abate a violation within the time originally fixed in a sec. 104(b) notice, he abuses his enforcement discretion by issuing a withdrawal order if, in the circumstances, the time for abatement should be further extended. 30 U.S.C. § 814(b) (1970).

**APPEARANCES:** Richard V. Backley, Esq., Assistant Solicitor, and John H. O'Donnell, Esq., Trial Attorney, for appellant, Mining Enforcement and Safety Administration; Michael C. Hallerud, Esq., and Jonathan F. Buchter, Esq., for appellee, Old Ben Coal Company.

*OPINION BY CHIEF ADMINISTRATIVE JUDGE DOANE*

*INTERIOR BOARD OF MINE OPERATIONS APPEALS*

In an initial decision dated Feb. 24, 1975, Administrative Law Judge Littlefield vacated an order of withdrawal and an underlying notice of violation, both of which were issued to Old Ben Coal Company (Old Ben) under sec. 104(b) of the Federal Coal Mine Health and Safety Act of 1969. 30 U.S.C. § 814(b) (1970). He vacated both citations on the ground that the time fixed for abatement of the condition cited as a violation was too short to be reasonable. The Mining Enforcement and Safety Administration (MESA) appeals from Judge Littlefield's decision, contending: (1) that he erred in vacating the subject underlying notice because Old Ben did not specifically request such relief in its application for review; and (2) that, in vacating the related withdrawal order, he erred by failing to take into account a 2-hour period which elapsed between the expiration of the time specified for abatement in the subject notice and the time the related withdrawal order was issued.

For the reasons set forth in detail below, we conclude that the failure of Old Ben to plead specifically for an order vacating the subject notice provides no basis for reversing Judge Littlefield's order to that effect in the circumstances of this case. Nevertheless, we are setting aside that order because it is inconsistent with sec. 109 and con-

sequently an abuse of discretion under sec. 105(b) of the Act. 30 U.S.C. §§ 815(b), 819 (1970).

Insofar as Judge Littlefield's order vacating the subject withdrawal order is concerned, we agree with the result only and are affirming on the ground that the time fixed for abatement should have been " \* \* further extended \* \* ." 30 U.S.C. § 814(b) (1970).

*Procedural and Factual Background*

The subject notice of violation, 1 M.K., was issued to Old Ben at its No. 26 Mine by a federal inspector on Feb. 11, 1972. The inspector cited Old Ben for alleged accumulations of loose coal and coal dust which he found were in violation of 30 CFR 75.400. 30 U.S.C. § 864(a) (1970). The time fixed for abatement was 30 minutes.

Two hours after the time originally fixed for abatement expired, the inspector returned to the areas covered by the subject notice. Upon finding that abatement had not been completed, he issued a sec. 104(b) order of withdrawal, also denominated 1 M.K.

On Feb. 12, 1972, the inspector once more examined the area covered by the subject notice and withdrawal order, and upon finding that the alleged condition had been totally abated, issued a notice to that effect.

On Mar 13, 1972, Old Ben timely applied for review of Order 1 M.K., contending ultimately that it was unlawfully issued. MESA's organizational predecessor, the Bureau of Mines, answered on Mar. 23, 1972,

generally denying Old Ben's allegations of invalidity.

Judge Littlefield set this case for hearing by notice, dated Feb. 7, 1974. The hearing took place as scheduled on May 24, 1974.

Subsequently, Old Ben filed a posthearing brief on Aug. 26, 1974, and MESA did likewise on Sept. 10.

Judge Littlefield handed down his decision on Feb. 24, 1975, and MESA timely noted an appeal on Mar. 14, 1975. Subsequently, both parties submitted briefs.

### *Issues on Appeal*

A. Whether the Administrative Law Judge erred in vacating the subject notice of violation when Old Ben never requested such relief in its application for review.

B. Whether the Administrative Law Judge mistakenly vacated the subject withdrawal order on the basis of an allegedly erroneous assumption that the time fixed for abatement was the 30-minute period specified in the underlying notice of violation rather than the 2 hours that elapsed between the issuance of the notice and withdrawal order.

### *Discussion*

[1] As we noted at the outset, Judge Littlefield vacated Notice 1 M.K. on the theory that the time fixed for abatement therein was too short. On appeal, MESA argues that the Judge erred in providing such relief in the absence of a specific request therefor in the application for review.

Examination of the subject ap-

plication for review reveals that, although Old Ben characterized Notice 1 M.K. as "invalidly issued," there was, as MESA has pointed out, no specific request that such notice be vacated.<sup>1</sup> A specific request

<sup>1</sup> In pertinent part, omitting attached exhibits, the application for review reads as follows:

"COMES NOW, Old Ben Coal Corporation, Applicant, by and through its undersigned attorney, and pursuant to Sec. 105(a) of the Federal Coal Mine Health and Safety Act of 1969 (P.L. 91-173), makes application for review of Order of Withdrawal No. 1 MK of Feb. 11, 1972, a copy of which is attached as Exhibit A.

#### I

"It is the position of Applicant that the said Order was not lawfully issued in that it was issued upon Applicant's failure to abate an alleged condition within a time fixed which was of such short duration as to be unreasonable, arbitrary, capricious and impossible of performance by Applicant. In support of its position, Applicant states as follows:

"1. Notice of Violation No. 1 MK of Feb. 11, 1972, a copy of which is attached hereto as Exhibit B, was issued at 8:45 a.m., alleging accumulations of loose coal and coal dust at various locations as described in said Notice. Said Notice required that the alleged violation be totally abated by 9:15 a.m. on the same day—an elapsed time of but thirty (30) minutes:

"2. Upon Applicant's failure to totally abate the alleged violation within the time fixed—which failure was insured by the unreasonably short time fixed for abatement—the said Order of Withdrawal was issued.

"3. Applicant submits that the inspector resorted to a subterfuge in an effort to justify the issuance of an order of withdrawal when, at most, a notice of violation might have been authorized. Under the type of pretext illustrated in this instance, any alleged violation of a mandatory health or safety standard can be converted into a situation calling for an order of withdrawal—without regard to imminent danger or unwarrantable failure by the operator—by the simple ruse of fixing an impossibly short time within which to abate the alleged violation and then issuing an order of withdrawal for failing to meet the impossible abatement schedule. Applicant does not believe that the Bureau of Mines will condone such misuse of the Federal Coal Mine Health and Safety Act.

"For the foregoing reasons, Applicant urges that said Order of Withdrawal was not lawfully issued. Therefore, Applicant requests that said Order be vacated and held to be void ab initio."

for relief is required under 43 CFR 4.532(a)(1), which regulation governs the content of an application for review.<sup>2</sup> The failure of Old Ben to plead for vacation of the notice as an incident to the vacation of the withdrawal order constituted a defect in pleading when considered in light of the evidence presented at the hearing.<sup>3</sup>

Nevertheless, we are of the opinion that the granting of relief by Judge Littlefield despite such defect does not constitute reversible error in the circumstances of this case. We are so concluding because, as we have indicated in the past, the failure to make a timely objection below precludes an appellant from successfully claiming on appeal that an Administrative Law Judge erred by granting a party's claim for relief, even though a pleading defect occurred. *See Zeigler Coal Company*, 3 IBMA 448, 456-8, 81 I.D. 729, 1974-1975 OSHD par. 19,131 (1974), *aff'd on reconsideration*, 4 IBMA 139, 82 I.D. 221, 1974-

1975 OSHD par. 19,638 (1975), *rev'd on other grounds sub nom, United Mine Workers of America v. Kleppe*, 432 F. 2d 1403, *cert. denied*, — U.S. — (1976).<sup>4</sup>

The record of this proceeding shows that at the evidentiary hearing MESA never once objected to the materiality of evidence introduced solely for the purpose of showing whether the condition cited in the underlying notice was actually in violation of 30 CFR 75.400. Indeed MESA produced some of this evidence itself in support of a statement in its Answer averring generally that the notice " \* \* \* was properly issued pursuant to the provisions of Sec. 104(b) \* \* \*." That statement alone shows that from the very beginning MESA expected Judge Littlefield to make findings of fact and conclusions of law with respect to the validity *ab initio* of the notice. Moreover, any lingering misconcep-

<sup>2</sup> Section 4.532(a)(1) of 43 CFR provides as follows:

"(a) An application for review and an answer shall comply with applicable general requirements and shall contain:

"(1) A short and plain statement of (i) such party's position with respect to each issue of law or fact which the party contends is pertinent to the legality or correctness of the order or notice; (ii) and the relief requested by such party \* \* \*."

<sup>3</sup> Although a sec. 104(b) withdrawal order may have been terminated, an applicant for review of such order may claim that it should be vacated because of an invalid underlying notice which should itself be vacated. *See Zeigler Coal Company*, 4 IBMA 139, 147-150, 82 I.D. 221, 1974-1975 OSHD par. 19,638 (1975), *rev'd on other grounds sub nom, United Mine Workers of America v. Kleppe*, 532 F. 2d 1403, *cert. denied*, —, — U.S. — (1976).

<sup>4</sup> See also Fed. R. Civ. Proc. rule 15(b), 28 U.S.C.A. which reads as follows:

"(b) *Amendments to Conform to the Evidence.* When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subverted thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

tions that MESA may have harbored with respect to the precise dimensions of Old Ben's claim for relief should have been dispelled following receipt of Old Ben's posthearing brief. There, Old Ben made explicitly clear that it wanted the Judge to vacate the notice, and it set forth the reasons it thought would support such action. Yet, in replying to the posthearing brief, MESA made no protest over the apparent discrepancy between the content of the brief and the pleadings contained in the application for review. It simply met Old Ben's arguments head on. In view of MESA's failure to make a protest by objecting below at the appropriate time, we hold that it failed to preserve for appeal any objection it might have made based on pleading defects.

[2] Although we reject MESA's reasoning for setting aside the Judge's decision to vacate Notice 1 M.K. we nevertheless hold on *de novo* review that it must be set aside for other reasons. In vacating such notice solely on the basis of Old Ben's original contention that the time fixed for abatement was too short, Judge Littlefield seems to have overlooked Old Ben's abandonment of that theory. While Old Ben's application for review does suggest that the notice was invalid for the reason specified by the Judge, its posthearing brief makes clear that in the end Old Ben was arguing that the notice should be vacated *not* because the abatement time originally fixed was too short,

but rather because the issuing inspector allegedly erred in finding a violation of 30 CFR 75.400 and also because such regulation was alleged to have been invalidly promulgated. Furthermore, an erroneously short abatement time is not the kind of defect which provides the basis for a judgment vacating a notice of violation. The Judge's conclusion to the contrary was plainly inconsistent with the mandatory command of sec. 109 to assess a civil penalty for every violation of a mandatory health or safety standard, and we hold that an order vacating a notice of violation merely because it contains an unreasonably short abatement period is an abuse of discretion under sec. 105(b). 30 U.S.C. § 815(b) (1970). Accordingly, we are setting aside the Judge's order vacating the subject notice. Such action will permit the bringing of a civil penalty proceeding based thereon.<sup>5</sup>

## B.

[3] We turn now to the remaining question on appeal which is whether Judge Littlefield erred in adjudicating the validity of the subject withdrawal order on the basis of the 30-minute abatement period fixed in Notice 1 M.K. MESA argues that the 30-minute period was "extended" by the additional 2 hours that elapsed prior

<sup>5</sup> The failure of the Judge to determine whether there was in fact a violation as found by the inspector was harmful to Old Ben. However, Old Ben did not appeal, and consequently, we need not remand, *See* n. 3, *supra*.

to the issuance of the related withdrawal order.

Here again, both MESA and Judge Littlefield seem to have misapprehended the significance of the evolving nature of Old Ben's attack on the validity of the subject withdrawal order. As we indicated above, Old Ben initially pleaded that such withdrawal order was invalid because the time originally fixed for abatement in the underlying notice of violation was unreasonably short. However, in its posthearing brief, Old Ben significantly altered its argument in light of the terms of sec. 104(b) and the evidence. Seeking to bring its claim squarely into alignment with the express statutory criteria for issuance of section 104(b) withdrawal orders, Old Ben contended in part that the subject withdrawal order was invalid because it was based upon the erroneous finding " \* \* \* that the period of time [for abatement] should not be further extend \* \* \*." The basic problem in this case is that Judge Littlefield's findings and conclusions and MESA's arguments on appeal relate to Old Ben's original argument in its application for review and are largely unresponsive to the ultimate issue that was tried by implied consent and discussed at length in Old Ben's posthearing brief.

Focusing upon the actual issue, namely, whether the inspector abused his enforcement discretion by issuing a withdrawal order instead of further extending the time for abatement, it is immediately clear that MESA's argument with

respect to the 2 hours that elapsed prior to the issuance of the subject withdrawal order is only marginally relevant. Even if we were to accept the proposition that the failure by the inspector to reinspect during the 2 hours following expiration of the originally fixed 30-minute abatement period constituted an extension of time under sec. 104(b) *as a matter of law*, such proposition could hardly be the major premise of a logical argument concluding with the holding that the inspector correctly found that the time fixed for abatement should not be *further* extended.<sup>6</sup> That holding could only be based on premises concerning the *facts* confronting the inspector at the time he issued the subject withdrawal order regarding whether an *additional* abatement period should be allowed. Viewed from that standpoint, it does not matter whether the time originally fixed for abatement was impliedly extended from 30 minutes to 2½ hours.

Having examined the evidence of record, we are satisfied that, in the circumstances, an additional abatement period should have been granted in preference to the issuance of a withdrawal order, and we so find (Tr. 103, 109-111, 117-119).

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<sup>6</sup> Parenthetically, we observe that the subject withdrawal order on its face plainly stated that the predicate for its issuance was " \* \* \* the expiration of the time *originally* fixed \* \* \*." That statement clearly undercuts MESA counsel's argument that there was an implied extension of time. Moreover, we think that an extension can only be granted by formal notice, as indeed has been MESA's practice.

Accordingly, we are affirming the portion of the decision below vacating Order 1 M.K., for the reasons stated above.

### ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior, 43 CFR 4.1(4), IT IS HEREBY ORDERED that the decision in the above-captioned docket IS SET ASIDE insofar as it vacates Notice 1 M.K., Feb. 11, 1972.

IT IS FURTHER ORDERED that the decision below IS AFFIRMED insofar as it vacates Order 1 M.K., Feb. 11, 1972.

DAVID DOANE,  
*Chief Administrative Judge.*

WE CONCUR:

HOWARD J. SCHELLENBERG, JR.,  
*Administrative Judge.*

LOUIS E. STRIEGEL,  
*Member of the Board.*

### MOUNTAINEER COAL COMPANY

6 IBMA 308

Decided September 24, 1976

Appeal by Mountaineer Coal Company from a decision by Administrative Law Judge Paul Merlin, dated July 14, 1975, in Docket No. MORG 75-272, which upheld an imminent danger Order of Withdrawal and denied an Application for Review thereof.

Affirmed.

### 1. Federal Coal Mine Health and Safety Act of 1969: Evidence: Credibility of Testimony

Where substantial evidence of record corroborates the findings of the trial judge that the testimony of the witness for one party is more credible than testimony of the witnesses for another party, the Board, on appeal, will not disturb such finding of credibility.

### 2. Federal Coal Mine Health and Safety Act of 1969: Evidence: Photographs: Probative Weight

Where photographs are introduced in evidence, particularly for the purpose of showing shade and color, and the party introducing such evidence fails to establish the accuracy thereof in terms of being true representations of the shade and color of the subject of such photographs, it is proper for the trier of fact to give no probative weight to such evidence.

APPEARANCES: Alan B. Mollohan, Esq., and Michael G. Kushnick, Esq., for appellant, Mountaineer Coal Company; Thomas A. Mascolino, Esq., Assistant Solicitor, and Frederick W. Moncrief, Esq., Trial Attorney, for appellee, Mining Enforcement and Safety Administration.

### OPINION BY CHIEF ADMINISTRATIVE JUDGE DOANE

### INTERIOR BOARD OF MINE OPERATIONS APPEALS

#### *Factual and Procedural Background*

At 1 p.m. on Feb. 3, 1975, a Mining Enforcement and Safety Administration (MESA) inspector

issued a sec. 104(a) Order of Withdrawal to Mountaineer Coal Company (Mountaineer) during an inspection of Mountaineer's Love-ridge No. 22 Mine located in Fairview, Marion County, West Virginia. This Order cited the following conditions as constituting an imminent danger:

The No. 1 belt located in the main north section had an excessive amount of coal float dust (fine) on the floor and 3 feet up the ribs for a distance of 2000 feet and in the adjoining crosscuts right and left and in the No. 3 entry which runs parallel with the conveyor belt entry.

There is [sic] five bottom rollers bad in this conveyor belt.

The Order was terminated at 11:30 a.m. on Feb. 5, 1975. On the morning of Feb. 4, 1975, a party consisting of the president of Mountaineer, the chairman of the United Mine Workers local safety committee, an independent mining engineer, the vice president in charge of safety of Mountaineer's parent company, Consolidation Coal Company, the company shift inspector who had accompanied the MESA inspector when the Order was issued, a metallurgical and environmental engineer employed by another subsidiary of Consolidation Coal Company, and a professional photographer inspected the cited conditions. At this time the photographer took a number of pictures of the area, some of which were offered and accepted as evidence by the Administrative Law Judge (Judge).

Mountaineer filed a timely Application for Review of this Order and a hearing was held in Arlington, Virginia, on Apr. 30, 1975. On July 14, 1975, the Judge issued his decision in which he concluded that the Order had been properly issued and denied Mountaineer's Application for Review. In reaching this result the Judge found that the MESA inspector's description of the area, that it was black with float coal dust on the floor and three feet up the ribs, was essentially corroborated by the shift inspector who was present during both the MESA inspection and the company inspection, and he found that the condition cited in the Order existed as alleged. The Judge based his conclusion that imminent danger existed on his findings that: (1) the cited condition did exist; (2) the subject mine had experienced methane ignitions in the past; (3) the belt was shaggy and old; and (4) the belt had five bad rollers.

In his decision, the Judge Acknowledged that a conflict existed between the inspector's description of the area and that of the company inspection team. In resolving this conflict by accepting the inspector's testimony the Judge found that the conditions were materially changed between these two inspections by the carrying out of the company shift inspector's order to have the area dragged. He also found that the photographs submitted by Mountaineer did not provide a basis for vacating the Order because

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some of the testimony indicated that the photographs distorted the true condition particularly with respect to brightness, one of the principal substantive issues herein, and that Mountaineer produced no evidence that such distortion did not occur.

Mountaineer filed a timely Notice of Appeal, and, in its supporting brief, contended that the Judge erred in: (1) finding that the area had been materially changed between the two inspections; and (2) refusing to accept the testimony of the operator's witnesses, the accuracy of the photographic exhibits, and the results of the analysis of float coal dust samples taken by the operator. Ultimately, Mountaineer contends that the Judge's acceptance of the inspector's description of the area and his conclusion that an imminent danger existed constituted error.

In its reply brief, MESA states that the Judge's finding that the cited conditions existed as described by the inspector was not based solely on his finding that the area had been materially changed, but is supported by the substantial evidence of record. Further, MESA contends that the Judge was correct in concluding that these conditions constituted imminent danger.

The Board held oral argument in this case on Jan. 30, 1976.

#### *Issue Presented*

Whether the Judge erred in accepting the testimony of the MESA

inspector regarding the condition cited in the Order and in discounting the testimony and photographs of the operator on the ground that they were not descriptive of the conditions existing in the mine at the time of issuance of the subject Order.

#### *Discussion*

Mountaineer is not contending that the Judge erred in his conclusion of law, supported by witnesses for both parties, that if an accumulation of float coal dust is "black," it is approaching the point where it will propagate an explosion or mine fire, and in and of itself, is an imminent danger (Tr. 85, 87, 94, 150-151). Mountaineer is challenging the Judge's ultimate finding of fact that the accumulation cited *was* "black" based upon the MESA inspector's testimony. After review and analysis of the record, we are of the opinion that the Judge's findings of fact are supported by substantial evidence.

[1] In making his findings of fact the Judge resolved the evidentiary conflict between MESA and Mountaineer in MESA's favor. MESA's evidence consisted of the testimony of the issuing inspector concerning the conditions he observed during the inspection and the testimony of a MESA expert on the characteristics of float coal dust and accumulations thereof. Mountaineer's evidence consisted of the testimony of the six members of the inspection team, photographs taken

at the time of the company-organized inspection, and the results of the analysis of float coal dust samples taken by Mountaineer. In finding that the conditions existed as cited by the MESA inspector, the Judge found his testimony to be more credible because it was essentially corroborated by the testimony of the only Mountaineer witness, the shift inspector, who was present during both the MESA inspection and the company-organized inspection (Dec. p. 7). He also found that Mountaineer's other witnesses materially changed the conditions in the subject area from those observed by the MESA inspector on Feb. 3d by walking through such area (Dec. p. 8). The Judge based his ultimate finding of material change primarily on his finding that the area in question had been recently dragged. As he pointed out, upon seeing the area in question the MESA inspector told the company shift inspector to have the area dragged (Tr. 119). The company shift inspector then told his assistant to get a man or two and start dragging the belt (Tr. 120). Neither party at the hearing addressed the question to any witness—whether the belt was in fact dragged as directed. Thus, the Judge was confronted with testimony by Mountaineer's witnesses that the area looked recently dragged at the time of their inspection (Tr. 144-145, 157, 166-167, 169, 172, 176, 191), testimony of the MESA inspector that none of the area looked dragged at the time of

his inspection (Tr. 59), and an outstanding order to have the area dragged between the two inspections. In accepting the inspector's testimony the Judge chose to believe that the order to have the belt dragged was carried out. There is no evidence of record which would indicate that this choice was erroneous. Accordingly, his finding of dragging and material change of conditions between the time the order was issued and the time of the company inspection must be affirmed.

[2] With respect to the photographs submitted by Mountaineer, the Judge refused to accord them probative weight because they were taken after the area had been dragged and because observations of two of Mountaineer's witnesses regarding the brightness of the pictures (Tr. 132, 164-165) cast further doubt on the accuracy of the pictures apart from the intervening dragging. Although the Board is appreciative of the effort made by Mountaineer to supplement the verbal record with photographic evidence, we must concur with the Judge in his statement that "where \* \* \* shading and degree of color are the principal substantive issues and where \* \* \* pictures taken underground are used to sustain a particular position with respect to shading and color, proof should be introduced that the very manner in which the pictures were taken, *e.g.*, flash equipment, did not distort reality." The record indicates that such

a distortion may have occurred (Tr. 132, 164-165). Mountaineer offered no evidence which would substantiate the accuracy of the photographs. Accordingly, the Board is reluctant to disturb the Judge's finding that the photographs failed to provide a basis for vacating the Order.

Mountaineer also contends that the results of the analyses of three dust samples should have been accorded more probative weight by the Judge. The Judge accorded these results no probative weight for a variety of reasons which included: 1) the samples were taken after the area had been dragged; 2) Mountaineer could not explain or identify the procedure used to take the samples even though it stated that a MESA procedure was followed; 3) it was not shown that the individual taking the samples was trained or qualified to do so; 4) skim samples were taken but MESA's expert on float coal dust stated that the taking of skim samples was not practical (Tr. 111-112); and 5) the samples were submitted by Mountaineer to MESA for analysis unfairly in that such submission was made without informing MESA's analyst that the samples had been taken in connection with the subject withdrawal order and that the results might be used in challenging such Order.

The Board is of the opinion that Mountaineer's contention cannot be sustained. It has failed to show that the reasons given by the Judge for

not according the laboratory analyses results any probative weight are fallacious or incorrect. Therefore, we concur in the Judge's finding that the laboratory analyses of the three dust samples submitted by Mountaineer should be accorded no probative weight.

Since the Board has affirmed the Judge's finding with respect to the presence of an excessive accumulation of float coal dust and since the Judge found, and Mountaineer did not dispute, that there were numerous ignition sources in the belt entry including the old and shaggy belt itself and the five bad bottom rollers, and that the instant mine had a history of methane ignitions, we must also affirm the Judge's conclusion that imminent danger existed at the time of issuance of the subject Order of Withdrawal.

### ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Judge's decision in the above-captioned case IS AFFIRMED.

DAVID DOANE,

*Chief Administrative Judge.*

WE CONCUR:

HOWARD J. SCHELLENBERG, JR.,  
*Administrative Judge.*

DAVID TORBETT,  
*Alternate Administrative Judge.*

# RELOCATION OF FLATHEAD IRRIGATION PROJECT'S KERR SUBSTATION AND SWITCHYARD

Withdrawals and Reservations: Generally—Statutory Construction: Generally—Indian Water and Power Resources: Generally

Sec. 5(b) of the Act of May 25, 1948 (62 Stat. 269) is not applicable to those tribal lands upon which the Flathead Irrigation Project's Kerr Substation and Switchyard are located.

The opinion dated Jan. 31, 1968, M-36735, is reversed and withdrawn.

M-36735 (Supp.)

*September 24, 1976*

OPINION BY ASSOCIATE  
SOLICITOR CHAMBERS

OFFICE OF THE  
SOLICITOR

*September 17, 1976*

TO: COMMISSIONER OF INDIAN AFFAIRS  
ATTN: OFFICE OF TRUST RESPONSIBILITIES

FROM: ASSOCIATE SOLICITOR, INDIAN AFFAIRS

SUBJECT: WHETHER SEC. 5(b) OF THE ACT OF MAY 25, 1948 (62 STAT. 269) IS APPLICABLE TO LANDS ON WHICH THE KERR SUBSTATION OF THE FLATHEAD IRRIGATION PROJECT IS LOCATED.

The Kerr Substation of the Flathead Irrigation Project is situated on a tract of land identified as Lot 8 of sec. 11, T. 22 N., R. 21 W., P. M.,

Montana. This land, owned by the Tribes, was reserved by the Secretary pursuant to a 1909 Act authorizing him to reserve from further disposition all locations within the reservation "chiefly valuable for power sites or reservoir sites." Sec. 22 of the Act of Mar. 3, 1909 (35 Stat. 781, 795).<sup>1</sup>

No serious Congressional consideration was given to the development of power at the sites reserved by the Secretary under the authority of sec. 22 of the 1909 Act, *supra*, until 1926. Through the Appropriations Act of May 10, 1926 (44 Stat. 464-65), Congress appropriated funds for the continued construction of the Flathead Irrigation Project (which had begun in 1909) and also authorized appropriations for the development of power on the reservation (presumably at those sites reserved by the Secretary of the Interior in 1909-1910<sup>2</sup>). Before construction

<sup>1</sup> Pursuant to this authority, the Secretary, by letters to the President of the Senate and Speaker of the House of Representatives, dated Apr. 21, 1909, Mar. 23, 1910, and Apr. 28, 1910, respectively, withdrew certain tribal lands, which included reservoir sites and five hydroelectric sites. One of the sites reserved (tribal site No. 1) is the site upon which the Federal Power Commission Kerr Project No. 5, Montana, is now located. Included in this tribal site No. 1 was Lot 8 of Sec. 11, T. 22 N., R. 21 W., P. M., Montana. The other four sites are downstream from Site #1 and have yet to be developed. They include Buffalo Rapids Sites #3 and #4, which the Tribes and the Montana Power Company at one time contemplated developing jointly under a Federal Power Commission license; Sloane's Bride, Site #3 (between the Buffalo Rapids Sites); and Site #5, considerably further downstream.

<sup>2</sup> The legislative history of the 1926 Act, *supra*, is silent as to the intent of Congress relative to the purpose and location of the power plants to be constructed.

## SUBSTATION AND SWITCHYARD

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began, however, the Rocky Mountain Power Company—a subsidiary of the Montana Power Company—attempted to persuade this Department and Congress to permit full *private* development of the power production potential on the reservation. These negotiations resulted in an amendment to the 1926 Act, *supra*, through the Act of Mar. 7, 1928 (45 Stat. 212, 213), which authorized the Federal Power Commission to issue a license for the private development and production of hydroelectric power at the sites reserved by the Secretary in 1909-10. The 1928 amendatory legislation also authorized the unexpended balance of the 1926 appropriation for the construction of the reservation's power system to be used for the construction and operation of a power distribution system for the irrigation project. The Federal Power Commission subsequently issued a license to the Rocky Mountain Power Company, which license was subsequently transferred to the Montana Power Company. After Kerr Dam was constructed in the 1930's—and until 1954<sup>3</sup>—these lands were a part of

the licensed project and used by Rocky Mountain and Montana Power.

The Flathead Irrigation Project facilities<sup>4</sup> were constructed on tribal lands and individual allotted lands, but until the enactment of subsec. 5(b) of the Act of May 25, 1948, 62 Stat. 269, no provision was made to compensate the Tribes for this use of their property.

Subsec. 5(b) of the 1948 Act, *supra*, provided that \$400,000 be deposited in the United States Treasury for the benefit of the Tribes;

\* \* \* of which sum one-half shall be in full settlement of all claims of said tribes on account of the past use of tribal lands for the physical works and facilities of the irrigation and power systems of the [irrigation] project, or for wildlife refuges; and the other one-half shall be in full payment to said tribes for a permanent easement to the United States, its grantees and assigns, for the continuation of any and all of the foregoing uses, whether heretofore or hereafter initiated, upon the *tribal lands now used or reserved for the foregoing purposes*. \* \* \* The amount deposited in the Treasury pursuant to this subsection shall be added to the construction costs of the project and shall be reimbursable. (Italics added).

The primary purpose of the 1948 Act, *supra*, was to establish repayment procedures for the Flathead

<sup>3</sup>In 1954 the Flathead Irrigation Project initiated negotiations with the Tribal Council of the Confederated Salish and Kootenai Tribes seeking approval for the consolidation and relocation to Lot 8 of Sec. 11, T. 22 N., R. 21 W., Principal Meridian, Montana, of a switchyard and substation which were purchased from the Montana Power Company. The Tribal Council approved of the requested relocation on the condition that a determination would be made as to whether additional compensation is owing to the Tribes for the use of Lot 8 for irrigation purposes.

<sup>4</sup>The Flathead Irrigation Project's power *distribution* system is entirely separate and distinct from the hydroelectric *production* system built and operated by the Montana Power Company pursuant to a license issued by the Federal Power Commission. The Flathead Irrigation Project does not encompass significant power production facilities.

Irrigation Project so as to insure the ultimate recovery by the United States of the whole amount of its reimbursable investment in the construction of the irrigation and power systems of the irrigation project. *See* H. Rept. No. 1691, 80th Cong. 2d Sess. (1948) and *Confederated Salish and Kootenai Tribes v. United States*, 181 Ct. Cl. 739, 749, n.5 (1967).

I have been asked by the Confederated Salish and Kootenai Tribes to reexamine an earlier conclusion by an Assistant Solicitor of this Division holding that the payment to the Tribes under sec. 5(b) of the 1948 Act, *supra*, included payment for the relocation of the irrigation project's switchyard and substation to tribal lands.<sup>5</sup> The lands in question were clearly "reserved for power systems" in 1948; the critical question is whether they were reserved for "power systems of the [irrigation] project" as of the date of that Act. I conclude that they were not, and hence that the Tribes have never been compensated for their use. My reasoning follows:

The Flathead Indian Reservation was established by the Treaty of Hell Gate, July 16, 1855 (12 Stat. 975). By the Acts of Apr. 23, 1904 (33 Stat. 302) and May 29, 1908 (35 Stat. 444), provisions were made, *inter alia*, for the construction of an irrigation system within the reservation. Congress, through the

Appropriations Act of Mar. 3, 1909 (35 Stat. 781, 795), appropriated funds for the construction of this irrigation system. The original plan for the Flathead Irrigation Project contemplated only the development of the Flathead River to furnish power for pumping to supplement the gravity water supply.<sup>6</sup>

Construction of the Flathead Irrigation Project began shortly after 1909 and the project was substantially completed by the mid-1940's. At the present time, the Flathead Irrigation Project consists basically of two components; (a) an irrigation system which is designed to provide water for approximately 138,000 acres of land within the reservation; and (b) a power *distribution* system which is designed to provide power for all purposes throughout the Flathead Indian Reservation. The power furnished to the Flathead Irrigation Project for distribution is produced mainly by the operation of the Montana Project No. 5 by the Montana Power Company (*See* n. 4, *supra*). The irrigation project also has a small generating unit, known as the Hell Roaring Creek Power Project which is capable of producing only a small amount of power for pumping to supplement the gravity water supplies. It has no substantial power generating facilities.

The original plan for the Flathead Irrigation Project was to develop only that amount of power from the Flathead River necessary

<sup>5</sup> Memorandum of Oct. 20, 1965 and Jan. 31, 1968 of the Assistant Solicitor, Indian Legal Activities, re: Enlargement of Kerr Substation, Flathead Irrigation Project. See n. 3.

<sup>6</sup> See this Department's Legislative History for the Act of May 25, 1948 (62 Stat. 269).

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to pump additional water to supplement the gravity water supply. However, when appropriating funds for the construction of the irrigation project, Congress also recognized that the Flathead Indian Reservation contained other valuable natural power sites which would not be needed to implement the operation of the irrigation project. The Senate Interior Committee reporting on the bill which ultimately became the Appropriation's Act of 1909, *supra*, announced that "(t)here are located in this reservation power sites of great value, and it would be advisable from every point of view to reserve these sites for future disposition by congressional action." Senate Rept. No. 1036, 60th Cong., 2d Sess., 17-18 (1909). Accordingly, Congress enacted section 22 of the Appropriation's Act of 1909.

In discussing Congressional intent for the enactment of section 22 of the 1909 Act, *supra*, the Court of Claims in the case entitled *Confederated Salish and Kootenai Tribes v. United States*, 181 Ct. Cl. 739 (1967), recognized (at p. 745) that withdrawals pursuant to section 22 of the 1909 Act, *supra*, were not intended to support the operation of the irrigation project but rather to reserve in Congress the right to direct the future hydroelectric development of these locations—whether by the Flathead Irrigation Project or by someone else. In 1928 Congress did authorize the hydroelectric development of these sites, and

Lot 8 was withdrawn in 1930 pursuant to the provisions of section 24 of the Federal Power Act, 16 U.S.C. § 818 (1970), for the Montana Power Company's Kerr Project No. 5. An Order of the Commission, dated Oct. 2, 1963 (Docket No. DA-173-Montana; Bureau of Indian Affairs, Department of the Interior), reflected the fact that Lot 8 was withdrawn for power purposes and was being used by the Montana Power Company for the dam site, powerhouse, operators' quarters and switchyard. Based on these facts, I conclude that neither of these withdrawals were for "the irrigation project" as required by the 1948 Act. To be sure, Project No. 5 is required by its Federal Power Commission license to deliver power to the project, but that fact plainly does not make it part "of the project" as required by section 5(b) of the 1948 statute. Project No. 5 is operated by a separate and unrelated company; its relationship, the project is that of a vendor. Moreover, even if the Secretary's 1909-10 withdrawal of Lot 8 could be perceived as intended to benefit the proposed irrigation project, the purpose of that withdrawal was modified in 1930 to develop the site to aid in the *production* of hydroelectric power by Montana Power—a separate entity.<sup>7</sup>

Counsel for the Flathead Irrigation Project has discussed this matter with my staff and has for-

<sup>7</sup> See n. 4, *supra*.

warded for our review copies of the pleadings, orders, and a final judgment in a 1942 condemnation proceeding entitled *United States v. Montana Power Company, et al.*, Civil No. 124, U.S.D.C., Montana. In this proceeding the United States, on behalf of the Flathead Irrigation Project, brought suit against the Montana Power Company to condemn certain of its lands, power lines, and rights-of-way. Included in this action was the condemnation of a power line and right-of-way across Lot 8. The court awarded to the United States, *inter alia*, all right, title, and interest of the Montana Power Company to the transmission line and right-of-way that traversed Lot 8.

Counsel for the irrigation project takes the position that these documents establish that, in 1948, the irrigation project had physical facilities on Lot 8 and, therefore, pursuant to section 5(b) of the 1948 Act, *supra*, the Tribes had been compensated for a permanent easement to the United States for the use of all of Lot 8.

I do not agree with counsel's position. As a result of the condemnation action, only a portion of Lot 8 was being used in 1948 for the physical works and facilities of the irrigation project. While section 5(b) of the 1948 Act *supra*, may have needlessly vested the United States with a permanent easement to the right-of-way that was the subject of the 1942 condemnation action, the 1954 relocation of the irrigation project's switchyard and substation to another area within

Lot 8 obviously did not come within the provisions of section 5(b) because, if the Secretary's 1909-10 withdrawal of Lot 8 was to benefit the irrigation project, there would have been no need for the 1942 condemnation proceeding at least as to the right-of-way because the irrigation project would have been the grantor of such an easement.

For the above-stated reasons, I am of the opinion that that portion of Lot 8 of Sec. 11, T. 22 N., R. 21, W, P. M., Montana, upon which the switchyard and substation were relocated, was not used in 1948 by the Flathead Irrigation Project and the the Secretary's 1909-10 reservation of Lot 8 was not to aid the development and operation of the irrigation project. Subsec. 5(b) of the 1948 Act, *supra*, is therefor inapplicable and the Tribes have gone uncompensated for the use of that portion of Lot 8 upon which the irrigation project's switchyard and substation are located. The memorandums of the Assistant Solicitor on this subject (dated Oct. 20, 1965 and Jan. 31, 1968) are reversed and withdrawn.

REID PEYTON CHAMBERS,  
*Associated Solicitor.*

#### CLINCHFIELD COAL COMPANY

6 IBMA 319

Decided September 27, 1976

Appeal by Clinchfield Coal Company from a decision by Administrative Law Judge Michael A. Lasher, Jr., assessing \$11,000 in civil penalties in

Docket No. NORT 74-751-P, for violations pursuant to sec. 109 of the Federal Coal Mine Health and Safety Act of 1969.

**Affirmed.**

**1. Federal Coal Mine Health and Safety Act of 1969: Appeals: Generally**

Where a party fails to raise an issue in prehearing pleadings, or at the hearing, it is precluded from doing so before the Board unless such issue involves jurisdiction or mootness.

**2. Federal Coal Mine Health and Safety Act of 1969: Hearings: Notice and Service**

An operator is given fair notice of the type and number of violations charged where an order of withdrawal specifically enumerates conditions and alleges that each such condition is a violation of a specific mandatory safety standard.

**APPEARANCES:** Raymond E. Davis, and John F. Hanzel, Esqs., for appellant, Clinchfield Coal Company; Robert J. Phares, Acting Assistant Solicitor, and Frederick W. Moncrief, Trial Attorney, for appellee, Mining Enforcement and Safety Administration.

**OPINION BY ADMINISTRATIVE JUDGE SCHELLENBERG**

**INTERIOR BOARD OF MINE OPERATIONS APPEALS**

On Sept. 28, 1973, an imminent danger withdrawal order was issued in Clinchfield Coal Company's (Clinchfield) Chaney Creek No. 2 Mine located in Clinchfield, Russell County, Virginia. The order, issued pursuant to sec. 104(a) of

the Federal Coal Mine Health and Safety Act of 1969 (Act)<sup>1</sup> described the following conditions:

A fatal roof fall accident has occurred underground on the "B" Left Section off the West Mains. This order is written pending the completion of an investigation to determine the cause of the accident and means to prevent a similar occurrence.

**Continuation Sheet No. 1**

The following violations of the approved roof control plan, of section [30 CFR] 75.200 were revealed during the accident investigation.

(1) The approved roof control plan was in violation in that metal jacks of sufficient length were not provided to support the roof by permanent roof supports during roof bolting operations.

(2) Testimony of employees given during the investigation revealed that all the provisions of the approved roof control plan have not been fully explained to all workmen whose duties require them to be on a working section. This is a requirement of the approved roof control plan which is to be initialed [*sic*] within one week after receipt of the plan. The approved roof control plan for this mine is dated July 19, 1973.

(3) A supply of supplementary roof supports of 20 posts of suitable proper length were not provided within 500 feet of the working places, on the dumping point.

(4) Sufficient suitable roof sounding devices were not provided for all the mobile face equipment on this section [hauling equipment excepted] (Exhibit P-1).

On Oct. 1, 1973, the inspector determined that the above conditions had been totally abated and terminated the order.

On Apr. 29, 1974, the Mining Enforcement and Safety Administra-

<sup>1</sup> 30 U.S.C. §§ 801-960, 841(a) (1970).

tion (MESA) filed a Petition for Assessment of Civil Penalty to which a copy of the above order was attached. On May 20, 1974, Clinchfield filed an answer generally denying that the violations occurred and requested a hearing. An evidentiary hearing was held in Kingsport, Tennessee, on Nov. 24, 1975.

The Judge issued his initial decision on May 7, 1976. As to each alleged violation he made specific findings concerning the operator's liability and the criteria under sec. 109(a) of the Act. Having concluded that three of the four alleged violations were proved, he assessed the following penalties:

Failure to provide metal jacks of sufficient length.....	\$5,000
Failure to supply supplementary roof supports.....	1,000
Failure to provide suitable roof sounding devices.....	5,000
Total .....	\$11,000

#### ISSUE ON APPEAL

1. Whether failure to raise an issue in prehearing pleadings or at the evidentiary hearing precludes a party from doing so on appeal before the Board.

2. Whether Clinchfield had adequate notice that four individual violations of the roof control standard were being charged.

#### DISCUSSION

[1] The Board, on at least two previous occasions, has held that where a party fails to raise an issue in prehearing pleadings or at the

evidentiary hearing it has waived its right to plead that issue before this Board. (*See Old Ben Coal Co.*, 6 IBMA 294, 301-302, 83 I.D. 335, 1976-1977 OSHD par. 21,094 (1976); and *Zeigler Coal Co.*, 3 IBMA 448, 456-8, 81 I.D. 729, 1974-1975 OSHD par. 19,131 (1974)). The question of multiplicity of violations as opposed to a single violation was not raised by the appellant at any time before the Judge. To the contrary, at the evidentiary hearing before the Judge, MESA's witness testified and enumerated four specific violations (Tr. 33-36). This multiplicity was neither objected to nor challenged by counsel for Clinchfield but in fact was acquiesced in by counsel (Tr. 56).

[2] Even if this holding relative to a pleading defect were not the case, the Board does not agree, as Clinchfield argues in its brief, that the facts in the instant case are analogous to those in *Old Ben Coal Co.*, 4 IBMA 198, 82 I.D. 264, 1974-1975 OSHD par. 19,723 (1975). The matter at issue is distinguished from the aforementioned case in the following respects: In that case the Judge determined and designated separate violations of the standards, whereas in the instant case the record indicates that "Continuation Sheet No. 1" of Order No. 1 CAG, Sept. 28, 1973, clearly lists four separately enumerated conditions charged by the inspector to be in violation of 30 CFR 75.200. MESA's Petition for Assessment of Civil Penalty states that copies of

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these documents were attached to the Petition and served upon Clinchfield by certified mail. In addition, the "Report of Fatal Coal Mine Roof-Fall Accident" compiled as a result of the accident investigation also lists four separate violations of 30 CFR 75.200 (Court Exhibit No. 1, p. 6). At the hearing, counsel for Clinchfield indicated that he had received a copy of the report (Tr. 91).

In addition, the Government's witness testified at the evidentiary hearing with respect to four specific violations. That testimony was not challenged in any manner by counsel for the operator during the course of the hearing. Finally, the Judge made findings with respect to four specific violations based on the evidence presented and the petition as filed by MESA and served upon the operator.

We conclude, therefore, that Clinchfield has not shown that it was prejudiced by insufficient notice of the four specifically alleged violations for which penalties were assessed.

### ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Judge's decision in the above-captioned case IS AFFIRMED. IT IS FURTHER ORDERED that Clinchfield Coal Company pay the penalties assessed in the total amount of \$11,000 with-

in 30 days from the date of this decision.

HOWARD J.  
SCHELLENBERG, JR.,  
*Administrative Judge.*

WE CONCUR:

DAVID DOANE,  
*Chief Administrative Judge.*

LOUIS E. STRIEGEL,  
*Member of the Board.*

### APPEAL OF ADDISON CONSTRUCTION COMPANY

IBCA-1064-3-75

Decided September 29, 1976

Contract No. 14-06-D-7333, Additions to Stegall Substation, Bureau of Reclamation.

Sustained.

1. Contracts: Performance or Default: Release and Settlement—Contracts: Construction and Operation: Actions of Parties

Insertion of the words "no exceptions" in a release executed by the contractor was held not to bar further consideration of the contractor's pending request for an extension of time where the Government's instructions for executing the release dealt only with claims in stated dollar amounts and directed the contractor to insert "no exceptions" if no such claims were to be filed and where in their conduct the parties did not treat the release as final.

2. Contracts: Performance or Default: Excusable Delays—Contracts: Disputes and Remedies: Damages: Liqui-

### dated Damages—Contracts: Disputes and Remedies: Burden of Proof

Where the Government failed to explain the presence of water which entered a 230 KV reactor while the reactor was under Government control and protected by Government security measures and where the water caused more extensive repairs to the reactor than would otherwise have been necessary, the Board found no basis for determining the portion of the delay for which each party was responsible and held that liquidated damages could not be charged for any of the delay.

**APPEARANCES:** Mr. Laurent A. Bougie, Attorney at Law, Tilly & Graves, Denver, Colorado, for the appellant; Mr. Gerald D. O'Nan, Department Counsel, Denver, Colorado, for the Government.

### OPINION BY ADMINISTRATIVE JUDGE PACKWOOD

#### INTERIOR BOARD OF CONTRACT APPEALS

This is an appeal from the contracting officer's denial of appellant's request for an extension of time for completion of a construction contract. The contracting officer's finding of fact pointed out that appellant had signed a release relinquishing his right to a contract adjustment, but the contracting officer did not treat the release as the final disposition of the matter and ultimately denied the request on the grounds that appellant failed to show any excusable cause for the delay.

#### *Findings of Fact*

The contract, in the estimated amount of \$192,727, was awarded

by the Bureau of Reclamation to the Addison Construction Company on May 12, 1972. The contract provided for construction and completion of Stage 03 Additions to the Stegall Substation in accordance with Specifications No. DC-6944. The contract included Standard Form 23-A, Oct. 1969 Edition (Appeal File, Exhibit 1).

Addison received notice to proceed on May 20, 1972. Paragraph 15 of the specifications divided the construction into two parts and scheduled completion of part one within 375 days after receipt of the notice to proceed and part two within 500 days. Part one was completed 5 days earlier than required and is not involved in this appeal. The date of receipt of the notice to proceed established Oct. 2, 1973, as the completion date for part two.

The work described under part two was primarily to furnish and install a 230 kilovolt reactor, a device similar in some respects to a transformer. The reactor selected by Addison to meet the specifications was manufactured by the General Electric Company at Pittsfield, Massachusetts.

The reactor was shipped from Pittsfield by rail on June 21, 1973, and arrived at the Stegall Substation on July 16, 1973. There was a positive pressure of 5 pounds per square inch inside the reactor and the dew point measured -32 degrees F., well within the dry range. External and internal inspection of the reactor revealed no sign of damage in transit and the only irregularity found was a loose locknut on a coil jackbolt, which was restored

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to the proper tension (Appellant's Exhibit A, I Tr. 56).<sup>1</sup>

During the time the reactor was removed from the railcar and assembled in the substation, the total open time was limited to about 4 hours. A final inspection after assembly again disclosed a dry dew point, this time of  $-15$  degrees F., which was 18 degrees below the required dew point under the temperature conditions on the day of inspection, Aug. 7, 1973. The reactor was then vacuum tested and a vacuum of 1-1.5 mm. was held for 17 hours. On Aug. 8, 1973, the reactor was filled with oil and a vacuum of 2-3 mm. was maintained. Before filling, the Government conducted dielectric tests on the oil to be used, which resulted in satisfactory readings of 35 to 40 KV. On Aug. 9, the Government made dielectric tests of the oil in the reactor and the results were again satisfactory with readings of 38 to 40 KV. On the same date, the Government conducted a Doble test to determine the insulation factor of the reactor, which yielded a reading of 1.22. Any insulation factor under 2.0 is considered satisfactory by the Bureau of Reclamation (I Tr. 60-71).

On Aug. 10, 1973, at approximately 10 a.m. the reactor was energized and tripped out immediately. Targets were present on the reactor's Type-J fault pressure relay and on the Bureau of Reclamation's

zero sequence modified admittance relay, indicating that both relays operated to trip out the electrical current to the reactor (I Tr. 72).

Following the tripout, the Government conducted another Doble test which showed the same insulation factor as the test conducted before the failure (I Tr. 73).

On Aug. 16, 1973, a GE representative and a Government inspector forced some of the oil from the top of the reactor into the atmo seal tank by means of dry nitrogen and opened a manhole in order to inspect the interior of the reactor. No water or rust were observed inside the reactor at that time. Low core readings on two sections of the core indicated the possibility of an arc-over somewhere from the core assembly to ground. It was determined to be necessary to pump all of the oil out of the reactor in order to make a complete internal inspection (I Tr. 74, 75).

The 10,000-gallon pillow tank needed to store the oil was not at the site, so the reactor was closed. The valve between the atmo seal tank and the reactor was opened to allow the oil to flow back into the main tank of the reactor and to keep the oil in the main tank under pressure from the head of oil in the atmo seal tank (I Tr. 75).

On Sept. 6, the oil was pumped from the reactor to the pillow tank. When the manhole cover was removed, there was water on top of the core and coil assembly and a quantity of water estimated to be between 5 and 15 gallons at the bottom of the reactor tank. There was

<sup>1</sup>The transcripts for the 2-day hearing in this appeal are numbered separately for each day. Transcript references herein for the first day are I Tr. followed by page numbers and II Tr. followed by page numbers for the second day.

also water on many of the horizontal members within the core and coil assembly. The elements of the reactor that were exposed to the water were oxidized. In view of the oxidation and since the examination did not disclose the cause of the electrical failure, it was determined to be necessary to send the reactor back to the factory for repair (I Tr. 76, 77).

Addison gave timely notice of the delay by letter of Sept. 21, 1973, to the contracting officer and requested an extension of time pursuant to Clause No. 5, the delay clause of the General Provisions of the contract (Appeal File, Ex. 8).

The contracting officer responded by letter of Oct. 19, 1973, and pointed out that since the cause of the failure had not been determined, it could not be determined whether the cause was unforeseeable and without the fault or negligence of the contractor or his supplier. The contracting officer requested that he be furnished all data relating to the cause of the failure after disassembly of the reactor and then he would determine whether an extension could be granted (Appeal File, Ex. 9).

The reactor was repaired at the factory and returned to the Stegall Substation on June 18, 1974. On July 1, 1974, the unit was successfully energized.

On Oct. 1, 1974, Addison's president signed a release and obtained final payment under the contract.

By letter of Oct. 22, 1974, Addison forwarded to the contracting

officer a copy of GE's report, dated Oct. 16, 1974, regarding the failure. Although the report discussed a number of possible causes of failure, the investigation by GE disclosed no deficiencies in the design and application of the reactor and no manufacturing defects. The report merely stated that the evidence led to the conclusion that excessive water caused the failure. The only unqualified statements were that excessive water caused the majority of the damage and that repair of the reactor would have been relatively simple and at a fraction of the actual cost without the extensive water damage (Appeal File, Ex. 27).

Although the report from GE did not firmly establish the cause of the failure, Addison asserted that the delay was due to unforeseeable causes beyond its control and without fault on its part, and renewed its request for an extension of time to Aug. 8, 1974, for completion of Part II of the contract.

On Jan. 31, 1975, the contracting officer made findings of fact denying Addison's request for an extension of time for the 269 days delay involved in the assessment of liquidated damages. Although the contracting officer stated that the contractor, by signing a release with no exceptions, had relinquished his rights to any contract adjustment, the release was not treated as the final disposition of the matter. The contracting officer also found that the failure was not without the fault or negligence of the contrac-

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tor or his supplier and the delay was not excusable under the terms of the contract (Appeal File, Ex. 28).

*Government's Motion to Supplement the Record*

In appellant's post-hearing brief, appellant mentioned, in connection with its argument that its signing of the release should not be considered an abandonment of its request for an extension of time, that it had no choice but to procure the reactor from General Electric (Appellant's Post Hearing Brief, p. 5).

The Government's contention is that sole source is not an issue in this appeal and, in any event, the matter should not be raised for the first time in a post-hearing brief. The Government offered to supplement the record with evidence to show that Addison was not directed to procure the reactor from General Electric and that the specifications did not require sole source procurement, if the Board should find it necessary to resolve this issue in reaching its decision.

Addison did not pursue the argument that the responsibility for the delay rested on a sole source supplier selected by the Government and therefore Addison should be relieved of that responsibility. On the contrary, Addison stated on brief that the possible causes of the failure discussed by witnesses at the hearing were mere speculation and it did not appear that GE was either negligent or at fault with re-

spect to the failure of the reactor to energize (Appellant's Brief, pp. 5, 10).

In the circumstances, the Board agrees with the Government's contention that sole source is not an issue in this appeal. The Board finds no necessity to resolve the question whether manufacturers other than GE could supply a reactor to meet the specifications, since Addison is not seeking to place the blame on GE for the failure of the reactor. Supplementing the record on this question would serve no useful purpose. The Government's motion is therefore denied.

*Effect of the Release*

[1] On brief, the Government urges that appellant should be bound by the release since he specifically and intentionally inserted the words "no exceptions" in the release, citing the following passage from a recent Court of Claims case:

Where a government contractor has, but fails to exercise, the right to reserve claims from the operation of such a release, it is neither improper nor unfair to invoke the principle that, absent some vitiating circumstance, the contractor cannot thereafter maintain a suit based upon events which occurred prior to the execution of the release. [*Inland Empire Builders, Inc. v. United States*, 191 Ct. Cl. 742 at p. 752 (1970).]

The flaw in the Government's argument is that there are a number of vitiating circumstances present in this appeal. The first is that the Government instructed appellant to

insert the words "no exceptions" if he had no claims stated in specific dollar amount.<sup>2</sup> Both the instructions which accompanied the release and the contract clause under which the release was required<sup>3</sup> speak only of claims in stated dollar amounts and offer no guidance with respect to the pending request for an extension of time. Boards of contract appeals have long followed the rule that in construing a release, it is proper to consider the circumstances under which it was executed, the relations between the parties and the nature and character of existing disputes.<sup>4</sup>

Addison's president testified that there was no reason to mention his pending request for an extension of time, of which the Government was aware, and since he had no claim for

a specific dollar amount, he followed the Government's instruction and inserted the words "no exceptions" (I Tr. 31-35).

The contracting officer testified that the reason Addison's request for an extension had not been acted upon by Oct. 1, 1974, when the release was signed, was that Addison had not submitted the information the Government had requested on the cause of the failure of the reactor (I Tr. 9, 10). When Addison received GE's report dated Oct. 16, 1974, it forwarded the report by letter of Oct. 22, 1974, and requested an extension of time to Aug. 8, 1974, for completion of Part II of the contract (Appeal File, Ex. 27).

The question of the cause of the failure was again reviewed by the Government after receipt of the GE report (I Tr. 11, 12) and the contracting officer subsequently issued findings of fact dated Jan. 31, 1975 (Appeal File, Ex. 28). We regard it as significant that the contracting officer did not rely solely on appellant's signing of the release as a basis for denying the request for an extension of time but proceeded to consider the request for an extension on its merits. The ultimate basis for rejection of the request was that it was not proved that the failure was without fault or negligence on the part of the contractor or his supplier. Since the contracting officer considered the request on its merits, the Board cannot avoid similar consideration of the merits

<sup>2</sup> The Government's instructions for executing the release are set forth in its letter of Sept. 25, 1974 (Appeal File, Exhibit 25): "Enclosed for your signature are "Release of Claims" and "Final Payment Voucher" for Specifications No. DC-6944, Stage 03 Additions to Stegall Sub-Station.

"The release should be signed by the same member of the firm whose name appears on the contract. Before executing the release, you should insert after the word "except" any and all claims that you may have against the Government pertaining to the contract. These claims should be stated in sufficient detail to permit clear identification and with each shall be stated the amount of the claim in dollars. If no claims are to be filed, the words "no exceptions" should be inserted after the word "except."

"Please sign the voucher where indicated by the red "x", complete and sign the attached labor certification, and return the release, labor certification and voucher to this office for processing. You may retain the enclosed copy of the voucher for your files."

<sup>3</sup> Clause 7(e) Standard Form 23-A, Appeal File Exhibit 1.

<sup>4</sup> See *National U.S. Radiator Corp.*, ASBCA No. 3505 (Oct. 31, 1961), 61-2 BCA par. 3192 at p. 16,539.

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in this appeal from the findings of the contracting officer.<sup>5</sup>

Accordingly, we conclude that the intention of the parties, as manifested in the Government's instructions regarding execution of the release and in the conduct of both parties subsequent to the date of the release, was that the release was applicable only to claims in stated dollar amounts and does not bar consideration of appellant's request for an extension of time, which was pending at the time the release was signed.

#### *Request for an Extension of Time*

[2] Evidence introduced at the hearing indicated that the failure which occurred on Aug. 10, 1973, when the reactor was energized was on the line shield ring at the bottom of the C phase on the high voltage side of the assembly. The failure puncture was consistent with either a water-saturated failure or an impulse puncture (Appellant's Exhibit C).

A General Electric Service Supervisor for the Rocky Mountain area, a graduate engineer with 11 years experience, testified that the two protective devices which tripped out when the reactor was energized were a sudden pressure relay and a ground relay, which

was also referred to as a zero sequence modified admittance relay. The Bureau of Reclamation had the responsibility for installing the ground relay, which was a prototype of a relay the Bureau had been developing (I Tr. 72, 73). The GE engineer further testified that the ground relay was improperly connected on the Bureau's voltage restraint coil which caused the relay to trip just as the voltage came on the line and did not allow the reactor to come up to full voltage (I Tr. 84). Based on his education and experience, the GE engineer stated his opinion that rapid energization and deenergization of an inductive coil can cause capacitance-related phenomenon and travel wave fronts that can build up on each other to the point where they could cause the failure which occurred in the shield ring. He expressed the view that the probability of such an impulse failure is as great as the probability of a failure caused by water saturation (I Tr. 84, 85).

The Government's construction engineer in charge of the project testified that the ground relay misoperated, without describing the nature of the misoperation, but he stated he had no information whether the ground relay was misconnected. He conceded that the ground relay could have been properly or at least differently connected when the reactor was successfully energized after repairs at the factory (II Tr. 15, 16).

<sup>5</sup> Where the parties do not treat a release as final, the Board will consider an appeal on its merits. See *Oregon Electric Construction, Inc.*, ASBCA No. 13778 (Nov. 17, 1970), 70-2 BCA par. 8594 at p. 39,920.

In refutation of the testimony by the GE engineer that the misconnected prototype of a developmental ground relay could have caused an impulse failure of the line shield ring, the Government offered expert testimony from the Head of the Power Systems Design Section, Electrical Branch, a graduate engineer with 29 years of experience with the Bureau of Reclamation (II Tr. 36). He stated that the purpose of protective relays is to protect equipment such as the reactor on the terminal of the line and to protect physically the transmission line when a fault occurs. He did not agree that the ground relay was misconnected, but instead he characterized the connection as unusual. Further, he expressed the opinion that the unusual connection would not, however, cause an unusual switching phenomenon for the transmission line (II Tr. 38, 39).

The Head of the Design Section also testified that if there had been faulty insulation in the reactor from a manufacturing defect, from water in the oil or from physical damage to the insulation, the failure would not occur immediately on a new piece of equipment, but would occur later as a result of overheating (II Tr. 41, 42).

The Government offered no evidence to deny that the ground relay was a prototype of a model which was under development by the Bureau of Reclamation. Although the Government expert described the purpose of the ground relay, no evidence was forthcoming on the ques-

tion whether the relay performed properly, other than the testimony of the construction engineer that the relay misoperated.

While the foregoing does not establish as a fact that the Government's use of the developmental ground relay caused the failure of the reactor, a substantial question is raised regarding the extent to which the Government may have contributed to the delay in question. Information concerning the state of development of the ground relay and whether or not it properly performed its protective function were within the possession of the Government or at least accessible to it. In the absence of such information, no adequate basis exists in the record for determining the extent of the Government's responsibility for the delay. This Board follows the rule that when the Government fails to come forward with information which it has or ought to have concerning the propriety of an assessment for liquidated damages, the assessment will not be sustained and the contractor will be granted an extension. *John H. Moon & Sons*, IBCA 815-12-69 (July 31, 1972), 79 I.D. 465, 72-2 BCA ¶ 9601, *affirmed on reconsideration*, 80 I.D. 235, 73-1 BCA ¶ 9966; *David M. Cow, Inc.*, IBCA 1092-12-75 (July 22, 1976), 76-2 BCA ¶ 12,003.

On the question whether the failure of the reactor was caused by water, the GE report of Oct. 16, 1974, states that all the evidence leads to the conclusion that excessive water caused the failure. The

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basis for such statement is not readily apparent. On the contrary, an examination of the evidence discloses that the only conclusion which reasonably may be drawn is that there was no water in the reactor when it failed. The reactor arrived at the railhead sealed and dry. After the reactor was moved to the substation it still tested dry just before being filled with oil. The oil used to fill the reactor passed the Government's dielectric tests, both before and after the fill, which indicated the oil contained no water. Doble tests of the insulating factor of the reactor yielded the same results before and after the failure, indicating the unit was still dry after the failure. No water or rust was found 6 days after the failure on Aug. 16, 1973, when a GE representative and a Government inspector opened the reactor for a joint examination. The first time water was discovered in the main reactor tank was on Sept. 6, 1973, when the oil was pumped out of the reactor and into a pillow storage tank. It would appear from the evidence that the water discovered on September 6 found its way into the reactor tank sometime after the completion of the inspection on August 16, since there is not a scintilla of evidence showing the presence of water before that time.

From the time the reactor was installed in the substation after being unloaded from the railcar, it was within the security perimeter established by the Government. Addison's representatives could obtain

authorized access to the site only by going through Government personnel and then being accompanied by Government personnel while inside the substation (II Tr. 12). The Government construction engineer testified that where and how the water got into the reactor had never been determined (II Tr. 16).

Regardless of the initial cause of the failure of the reactor, there is no controversy over the fact that excessive water caused the majority of the damage and that repairs to the reactor would have been relatively simple at a fraction of the time and cost but for the oxidation of metal parts and saturation of insulation caused by the water (Appeal File, Ex. 27). In the circumstances, the Government's failure to come forward with evidence as to where and how the water entered the reactor, at a time when the reactor was under the control of the Government, is not to be construed as absolving the Government from responsibility for the presence of water in the reactor. Pursuant to the rule in *Moon, supra*, there is also in this instance no basis for sustaining an assessment of liquidated damages.

The rule has been stated in slightly different form by another Board, that where some delay is caused by each party and it is not possible to allocate the mixed causes of delay between the parties, the Government may not recover liquidated damages for any of the delay period. *Globe Construction Company*, ASBCA No. 13316 (Sept. 10,

1971), 71-2 BCA par. 9123 at p. 42,302.

The Board finds that the delay of 269 days in completion of the contract cannot be apportioned among the various possible causes set forth in the record nor can it be apportioned between the parties. Pursuant to the rules laid down in *Moon* and *Globe, supra*, the Board finds that there is no adequate basis in the record for assessment of liquidated damages, and that Addison is entitled therefore to an extension of time for the period of 269 days involved in the assessment.

### *Summary*

1. The release signed by Addison applied only to claims in stated dollar amounts and did not bar further consideration of appellant's request for an extension of time which was pending at the time of execution of the release.

2. The Government failed to furnish information within its possession or accessible to it regarding the propriety of assessing liquidated damages for delayed performance. In the absence of such information, the record contains no adequate basis for sustaining the liquidated damages and appellant is entitled to an extension of time in the amount of 269 days.

G. HERBERT PACKWOOD,  
*Administrative Judge.*

I CONCUR:

WILLIAM F. MCGRAW,  
*Chief Administrative Judge.*

## ESTATE OF JOAN (JOANNA) HORSECHIEF

5 IBIA 182

Decided *September 29, 1976*

**Petition to Reopen.**

**Granted.**

**1. Indian Probate: Reopening: Generally—375.0**

The Superintendent of an Indian agency is a proper official of the Bureau of Indian Affairs to file a petition for reopening under the authority of 43 CFR 4.242, although he has no interest in the outcome of such petition.

**2. Indian Probate: Reopening: Generally—375.0—Indian Probate: Wills: Generally—425.0—Indian Probate: Wills: Lost Will—425.17**

An Indian will may be presented for probate even though the estate of the decedent has been distributed as intestate property.

**3. Indian Probate: Reopening: Generally—375.0**

It would be unconscionable for the Secretary of the Interior to fail to give effect to a Departmentally approved will of a deceased Indian which was misfiled by the Agency, unless it can be demonstrated by way of a hearing that the provisions of the will should not be followed.

**APPEARANCES:** Charlene Lois Fisher Factory, a/k/a Charlene Horsechief, and Mr. and Mrs. Ira Toney, guardians ad litem for Ray Franklin Toney, a/k/a Ray Tenequer, Jr., in opposition to the recommended order.

OPINION BY BOARD  
MEMBER HORTONINTERIOR BOARD OF  
INDIAN APPEALS

On Aug. 27, 1976, Administrative Law Judge Jack M. Short entered a Recommendation to Reopen Case and Order Suspending Distribution in the Estate of Joan (Joanna) Horsechief, deceased Wichita-Pawnee unallotted. An order determining heirs was filed in this case on Aug. 31, 1970. As no last will and testament of the decedent could be found, the Administrative Law Judge ordered that the trust property be distributed to decedent's 10 surviving children according to the applicable state laws of intestate succession. The recommendation for reopening this case was submitted to the Board after Judge Short was notified by the Superintendent of the Anadarko Agency of the Bureau of Indian Affairs, by letter dated May 13, 1976, that a document which purports to be the last will and testament of the decedent was recently discovered in the agency's files. The newly discovered will is dated Apr. 21, 1967, and its provisions dispose of the decedent's trust property differently than the Aug. 31, 1970, order requiring intestate distribution.

Judge Short's recommended order was docketed by the Board on Sept. 2, 1976. All interested parties, including decedent's heirs at law, were allowed to submit briefs for or against the recom-

mended reopening of decedent's estate through Sept. 27, 1976.

The briefing period granted to interested parties has now expired and the Board has reviewed the comments received. Opposition to the proposed reopening was expressed by Charlene Lois Fisher Factory, a/k/a Charlene Horsechief, and by Mr. and Mrs. Ira Toney, guardians ad litem for Ray Franklin Toney, a/k/a Ray Tenequer, Jr. They oppose reopening on grounds that the estate has been closed for more than 3 years and that the property rights granted to decedent's heirs at law should not now be disturbed.

[1] The Board finds no procedural objection to reopening decedent's estate. Judge Short's recommended order treats the Superintendent's letter of May 13, 1976, as a valid petition to reopen decedent's estate in accordance with 43 CFR 4.242(h). This regulation authorizes the Board to reopen an estate closed for more than 3 years where "there exists a possibility for correction of a manifest injustice." It is accepted that the Superintendent of an Indian agency is a proper official of the Bureau of Indian Affairs to file a petition for reopening under the authority of 43 CFR 4.242, although he has no interest in the outcome of such petition. *Estate of Marcel Arcasa (Deceased Colville, Allottee No. H-120)*, 2 IBIA 309, 81 I.D. 306 (1974); *Estate of Rose Josephine La Rose Wilson Eli*, 2 IBIA 60, 80 I.D. 620 (1973).

[2] Further, the Board agrees with the legal authority set forth by Judge Short which he uses to conclude that an Indian will may be presented for probate even though the estate of the decedent has been distributed as intestate property. See p. 2, Recommendation to Reopen, citing *3 Bowe-Parker: Page on Wills* § 26.26.

[3] While reopening the estate in this case may cause some administrative inconvenience, and, for some of the heirs at law, possible financial disappointment, it would be unconscionable for the Secretary of the Interior to fail to give effect to a Departmentally approved will of a deceased Indian which was misfiled by the Agency, unless it can be demonstrated by way of a hearing that the provisions of the will should not be followed.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Superintendent's Petition to Reopen this estate, dated May 13, 1976, be and the same is hereby GRANTED. Accordingly, IT IS FURTHER ORDERED that the Estate of Joan (Joanna) Horsechief be, and the same is hereby REMANDED to the Administrative Law Judge for appropriate action and proceedings.

WM. PHILIP HORTON,  
Member of the Board.

I CONCUR:

ALEXANDER H. WILSON,  
Administrative Judge.

## STATE OF WYOMING

27 IBLA 137

Decided September 29, 1976

Appeals from decisions of the Wyoming State Office, Bureau of Land Management, rejecting the State of Wyoming's applications for patents for school land in place excepting railroad right-of-way and for school indemnity with railroad right-of-way as base.

Affirmed.

### 1. Railroad Grant Lands—School Lands: Indemnity Selections—State Selections

A railroad right-of-way, granted under the Act of July 1, 1862, 12 Stat. 489, *as amended* by Act of July 2, 1864, 13 Stat. 356, crossing a school section, does not constitute lands "otherwise disposed of by the United States" within the ambit of the school indemnity statutes. Therefore a rejection of an indemnity selection application, offering such base, is proper.

### 2. Patents of Public Lands: Generally—School Lands: Generally

An application for patent to school lands in place, pursuant to 43 U.S.C. § 871a (1970), which requests an exclusion of the right-of-way granted under the Act of July 1, 1862, *as amended* July 2, 1864, must be rejected. Such a patent must be issued "subject to" the right-of-way.

APPEARANCES: A. E. King, Commissioner of Public Lands, State of Wyoming, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

INTERIOR BOARD OF LAND APPEALS

The State of Wyoming appeals from two decisions of the Wyoming State Office, Bureau of Land

Management (BLM). The first, dated Oct. 6, 1970, rejected the State's application, W-24998, seeking patent pursuant to 43 U.S.C. § 871a (1970) for certain school land sections within Laramie County, Wyoming, except for those traversed by the right-of-way of the original main line of the Union Pacific Railroad Company. The stated basis for this rejection was that the application failed to describe "full legal subdivisions." It described "a number of full sections or aliquot parts thereof, but each description was qualified by the clause, 'except that portion of the original main line right-of-way of the Union Pacific Railroad Company.'" BM held:

Patents must issue for lands described by full legal subdivisions in accordance with an official Government survey. Therefore, an application for patent which describes lands as cited above is improper. The right-of-way grant to the Railroad Company \* \* \* would be reserved in any patent issued to the State, but it could not properly be excluded from such a patent. The Department has held that the State took title under its grant of school lands in place, subject to the right-of-way (*State of Wyoming*, 58 L.D. 128).

A timely appeal from the Oct. 6, 1970, decision was filed, and on Dec. 10, 1971, the State filed application W-32556, pursuant to 43 U.S.C. §§ 851, 852 (1970), seeking lands as indemnity lieu selections for some of the acreage covered by that portion of the Union Pacific's right-of-way excluded from the previous application for patent. On Jan. 25, 1972, BLM issued a decision concerning the indemnity lieu selection

application, finding it defective because: (1) the State took title to school sections subject to the right-of-way granted to the railroad by the Act of July 1, 1862, 12 Stat. 489, *as amended*, by Act of July 2, 1864, 13 Stat. 356, *State of Wyoming, supra*; and (2) the railroad right-of-way grant to the Union Pacific Railroad Company by the Act of 1862 and 1864 was a "special grant" from Congress, and the Department had previously held that:

No provision is made by law for indemnifying the State in cases where the school section is crossed by railroads, claiming the right of way either under the act of March 3, 1875, or by a special grant from Congress \* \* \*.

*State of North Dakota*, 13 L.D. 454 (1891).

At appellant's request, these appeals have been consolidated for decision.

Wyoming contends that the original main line right-of-way of the Union Pacific is land which was previously disposed of under the laws of the United States. Therefore, it asserts the right to exclude that area from its patents for school sections in place and to make lieu indemnity selection for the lands lost.

Wyoming, by sec. 4 of its Statehood Act of July 10, 1890, 26 Stat. 222, received:

\* \* \* sections numbered sixteen and thirty-six in every township of said proposed State, and *where such sections, or any parts thereof, have been sold or otherwise disposed of* by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is

taken, are hereby granted to said State for the support of common schools, such indemnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior \* \* \*. [Italics supplied.]

The indemnity lieu selection law, 43 U.S.C. § 851 (1970), provides in part:

Where settlements with a view to preemption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections or either of them have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected, in accordance with the provisions of sec. 852 of this title, by said State, in lieu of such as may be thus taken by preemption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted and may be selected, in accordance with the provisions of sec. 852 of this title, by said State where secs. sixteen or thirty-six are, before title could pass to the State, included within any Indian, military, or other reservation, *or are, before title could pass to the State, otherwise disposed of by the United States: Provided, That the selection of any lands under this section in lieu of sections granted or reserved to a State shall be a waiver by the State of its right to the granted or reserved sections.* And other lands of equal acreage are also appropriated and granted, and may be selected, in accordance with the provisions of sec. 852 of this title, by said State, to compensate deficiencies for school purposes, where secs. sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. And it shall be the duty of the Secretary of the Interior, without awaiting the extension of

the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State shall be entitled to select indemnity lands to the extent of section for section in lieu of sections therein which have been or shall be granted, reserved, or pledged; but such selections may not be made within the boundaries of said reservation: *Provided, however, That nothing in this section contained shall prevent any State from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein.* [Italics supplied.]

A right-of-way for railroads under the pre-1871 laws granted to the railroads an estate greater than an easement but less than a fee simple absolute. *United States v. Union Pacific R.R. Co.*, 353 U.S. 112 (1957); *Great Northern Ry. Co. v. United States*, 315 U.S. 262, 273 (1942); *Rio Grande Western Railway Co. v. Stringham*, 239 U.S. 44, 47 (1915). In *Northern Pacific Ry. Co. v. Townsend*, 190 U.S. 267 (1903), the interest conveyed to the railroad in the right-of-way was dubbed a "limited fee estate." This term equates with a base, qualified or determinable fee.

[1, 2] At first blush, it might appear that lands conveyed to a railroad for a right-of-way under the pre-1871 statutes would constitute lands "otherwise disposed of" within the ambit of the Wyoming Statehood Act and the general indemnity statute. But such a conclusion essentially must rest upon a superficial reading of those statutes without regard to what has transpired since the enactment of the Act of

Feb. 28, 1891, 26 Stat. 796, the general indemnity statute. Such a conclusion ignores the Department's virtually contemporaneous construction of the indemnity laws, its long-continued administrative practice, the regulations of the Department, the juxtaposition of the indemnity laws with later laws, and the history of other kinds of grants, the lands in which are affected by pre-1871 railroad rights-of-way.

In the very same year that the general indemnity statute<sup>1</sup> was en-

<sup>1</sup>The Act of Feb. 28, 1891, *supra*, first uses the term "otherwise disposed of" in the general indemnity statutes. The Act amends REV. STAT. §§ 2275 and 2276 (1878), which provided:

"SEC. 2275. Where settlements, with a view to pre-emption, have been made before the survey of the lands in the field, which are found to have been made on secs. sixteen or thirty-six, those sections shall be subject to the pre-emption claim of such settler; and if they, or either of them, have been or shall be reserved or pledged for the use of schools or colleges in the State or Territory in which the lands lie, other lands of like quantity are appropriated in lieu of such as may be patented by pre-emptors; and other lands are also appropriated to compensate deficiencies for school purposes, where secs. sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever.

"SEC. 2276. The lands appropriated by the preceding section shall be selected, within the same land-district, in accordance with the following principles of adjustment, to wit: For each township, or fractional township, containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township, containing a greater quantity of land than one-half, and not more than three-quarters, of a township, three-quarters of a section; for a fractional township, containing a greater quantity of land than one-quarter, and not more than one-half, of a township, one-half section; and for a fractional township, containing a greater quantity of land than one entire section, and not more than one-quarter of a township, one-quarter section of land."

It follows that the contemporaneous construction of the 1891 Act is a cogent element in our consideration of the meaning of the term mentioned above.

acted, the Acting Secretary of the Department wrote to the Attorney General of North Dakota on Oct. 26, 1891, 13 L.D. 454-55, as follows:

No provision is made by law for indemnifying the State in cases where the school section is crossed by railroads, claiming the right of way either under the act of Mar. 3, 1875, or by a special grant from Congress, but if the roads are not entitled to the right of way over such sections, recourse must be had by the State or its purchasers against the company in the courts.

This decision affecting all the public land states has prevailed for some 85 years. There are no cases to the contrary. Indeed, the cases at bar raise the issue for the first time since the 1891 decision. There has been, therefore, universal acceptance of it for over 8 decades by the knowledgeable state officials dealing with public lands.

States seeking patents to school sections in place have been required to regard a school section invaded by a pre-1871 railroad right-of-way as a full section and patents have issued reciting simply that the grant is "subject to" the rights of the railroad under the particular granting act.

Virtually all classes of public land grantees have been required to accept patents which, as to the area covered by a railroad right-of-way, provided that the grant was subject thereto, e.g. homestead, *Oregon Short Line Ry. Co. v. Harkness*, 27 L.D. 430 (1898); mining claims, *Schirm-Carey and Other Placers*, 37 L.D. 371 (1908).

The Department's practice of not excluding special act railroad

rights-of-way from the area described in patents is described in *W. S. Burch*, 45 L.D. 473, 476-77 (1916), as follows:

In instructions of Nov. 3, 1909 (38 L.D., 284), *as amended* Jan. 19, 1910 (38 L.D., 399), the practice as indicated and the distinction between rights of way under general and special acts was preserved and reannounced. It will be borne in mind that the excepting or reservation clause involved was not an exclusion or elimination of an area of land but was a clause stating that the patent or conveyance was subject to the right of way of the specific company under the particular special act. The above-mentioned regulations are cited and explained in the instructions of Feb. 2, 1912 (40 L.D., 398), and it was there said:

Applicants to enter public lands that are affected by a mere pending application for right of way should be *verbally* informed thereof and given all necessary information as to the character and extent of the project embraced by the right-of-way application; and, further, that they must take the land subject to whatever right may have attached thereto under the right-of-way application, and at the full area of the subdivisions entered, irrespective of the questions of priority or damages, these being questions for the courts to determine.

In the case of the Schirm-Carey and other placers (37 L.D. 371, 374), the grant of the Atlantic and Pacific Railroad Company was involved. The 200-foot right-of-way, covering about 107.33 acres, crossed the affected locations and had been excluded from the patent proceedings and the entry. The Department said:

The difficulties and perplexities involved in the various aspects of the case, in view of the practice with respect to the disposition of lands in a similar situation under other public land laws, as

well as the serious question involved in the bisection of the claim by reason of the exclusion of the railroad right of way, is deemed by the Department to justify the conclusion reached by your office, that in no event can the entry as to any of the claims be passed to patent in the absence of supplemental patent proceedings including the previously excluded area constituting the railroad right of way.

In instructions of Mar. 13, 1911 (39 L.D. 565), involving the Northern Pacific right-of-way across the tribal lands of the Fond du Lac Indian Reservation in Minnesota, where the company had paid \$10 per acre for the area of its right-of-way, it was said:

While the right of way granted the Northern Pacific Railway Company by the act of 1864 is a grant in fee, it is not a fee simple but is subject to reversion in the event that the company should cease to use the land for railroad purposes. It is not the rule of the Department to except from patents issued to entrymen under the public land laws the area embraced in the right of way across the lands entered; nor has it been the practice to relieve purchasers under the public land laws from paying for the full area of the tract purchased, notwithstanding that such purchase is made subject to the company's right of way.

To except from a patent the tract of land included in the right of way would be to reserve a narrow strip of land which, if abandoned by the railroad company, would revert to the Government and would not inure to the benefit of the purchaser of the subdivisions traversed by such right of way.

It is believed that damages paid by the railway company in this case were merely damages resulting from the construction of the railroad across the reservation and in no sense represented a purchase of the land covered by the right

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of way. As above indicated, therefore, I must decline to approve the letter prepared by your office.

The Department in recent times has enunciated the view that "[n]o deduction in acreage or payments is allowed for land in entries traversed by railroad rights-of-way despite the fact that the right-of-way constitutes a base fee." Letter to Congressman Harold T. Johnson from Acting Legislative Counsel, Department of the Interior, dated May 5, 1964. Indeed, other disposals of land affected by rights-of-way have been made with no deduction in price therefor, *e.g.*, small tract affected by a highway right-of-way, *Joseph J. Miller, et al.*, A-30681, A-30686 (May 3, 1967), citing *James A. Power*, 50 L.D. 392 (1924).

The current regulation of the Department, 43 CFR 2801.1-2, provides:

All persons entering or otherwise appropriating a tract of public land, to part of which a right-of-way has attached under the regulations in this part, take the land subject to such right-of-way and without deduction of the area included in the right-of-way.

The consistent approach of the Department and of the affected public land states for some 85 years to the issues posed in these cases cannot be blithely relegated to oblivion. The Board reiterated in *Robert L. Beery*, 25 IBLA 287, 294, 83 I.D. 249, 252 (1976), Justice Holmes' observation that "A page of history is worth a volume of logic."

The history of consideration of the Congress of railroad bills shows that it was aware of the problem caused by railroad rights-of-way. Congress recognized that curative legislation was needed to vest in adjoining owners the lands in the rights-of-way upon forfeiture or abandonment by the railroad, *e.g.*, the Act of June 26, 1906, 34 Stat. 482, the Act of Feb. 25, 1909, 35 Stat. 647, 43 U.S.C. § 940 (1970), the Act of Mar. 8, 1922, 42 Stat. 414, 43 U.S.C. § 912 (1970). See *Union Pacific Railroad Company*, 72 I.D. 76 (1965). These Acts afforded a remedy, but that remedy was not indemnity.

The legislative history of the 1922 Act reflects Congressional awareness of the Department's practice of issuing patents for full legal subdivisions, making no diminution by reason of the prior rights-of-way. The House Report No. 217, 67th Cong., 1st Sess., relating to H.R. 244, culminating in the 1922 Act, reads in part as follows:

The object of this bill is to provide for disposition of lands embraced in forfeited or abandoned railroad rights of way on what was originally public lands. In some cases a right of way was granted by the Government and later forfeited, while in other cases change in the location of the railroad resulted in the abandonment of the old right of way. The act of Mar. 3, 1875, under which most of the rights of way over public lands have been granted contains a provision for forfeiture of the grant for failure to construct the railroad within a specified time succeeding the date of the grant. Under the decision of the courts railroad

companies receiving such grants take a qualified fee with an implied condition of reverter in the event the companies cease to use the lands for the purposes for which they were granted. Upon abandonment or forfeiture, therefore, of any portions of such right of way the land reverts to and becomes the property of the United States.

*It is, however, a fact that in making conveyances of subdivisions traversed by such rights of way the United States issues patents for the full area of the tracts or legal subdivisions, making no diminution by reason of the prior grant of the right of way.*

It seemed to the committee that such abandoned or forfeited strips are of little or no value to the Government and that in case of lands in the rural communities they ought in justice to become the property of the person to whom the whole of the legal subdivision had been granted or his successor in interest. Granting such relief in reality gives him only the land covered by the original patent. The attention of the committee was called, however, to the fact that in some cases highways have been established on abandoned rights of ways or that it might be desirable to establish highways on such as may be abandoned in the future. Recognizing the public interest in the establishment of roads, your committee safeguarded such rights by suggesting the amendments above referred to protecting not only roads now established but giving the public authorities one year's time after a decree of forfeiture or abandonment to establish a public highway upon any part of such right of way.

Where the forfeited or abandoned right of way which would otherwise revert to the United States lies within the limits of a city or village, then the bill provides that title thereto shall vest in such municipality, subject of course to the same provisions as to roads applicable to rural lands.

There is attached to and made a part of this report the letter of E. C. Finney, Acting Secretary of the Interior, to the

chairman of the committee, dated June 9, 1921.

DEPARTMENT OF THE INTERIOR,  
Washington, June 9, 1921.

Hon. N. J. SINNOTT,  
*Chairman, Committee on the Public Lands, House of Representatives.*

MY DEAR MR. SINNOTT: Receipt is acknowledged of your letter dated May 28, 1921, requesting a report on House bill 244, with which you submit a copy of House Report No. 851, Sixty-sixth Congress, second session, concerning House bill 9899.

The bill submitted by you entitled "A bill to provide for the disposition of abandoned portions of rights of way granted to railroad companies" provides that where rights of way of the character referred to granted to railroad companies have ceased or shall thereafter cease to be used for the purposes granted whether by forfeiture or by abandonment declared or decreed by a court of competent jurisdiction or by act of Congress, such abandoned right of way shall then go to the owner of the subdivision in which the same is located, except that in the municipalities the right of way shall go to such municipality.

This bill is similar in its object and provisions to said H.R. 9699, Sixty-sixth Congress, second session, upon which a report was made on December 4, 1919, in which the proposed legislation was favored, but certain changes and amendments were suggested in the proposed bill. This report is embodied in said House Report No. 851 submitted by you. The proposed legislation, H.R. 244, includes the amendments suggested in said departmental report.

Under the prevailing decisions of the courts the railroad companies to which grants of rights of way have been made of the character under consideration take a base or qualified fee with an implied condition of reverter in the event that the companies cease to use the land for the purposes for which it is granted (Northern Pacific Railroad Co. v. Town-

send, 190 U.S., 267, 271; *Rio Grande Western Railroad Co. v. Stringham*, 239 U.S., 44). *In making conveyances of the subdivisions traversed by such rights of way, however, the United States issues patents for the full area of the tracts, no diminution of acreage being made by reason of the prior grant of the right of way.* It follows as the result of the rulings above cited that upon the abandonment by any railroad company of any right of way or any portion of any right of way granted to it the legal title to the land included in such right of way reverts to and becomes the property of the United States and does not pass to any patentee or patentees to whom patents were issued for the full area of the subdivisions subject to the railroad company's prior right of use and possession.

The legislation proposed by this bill, therefore, would seem to be desirable, and I would recommend the enactment thereof.

The report submitted by you is herewith returned.

Respectfully,

E. C. FINNEY,  
*Acting Secretary.*

[Italics supplied.]

It is also noteworthy that the laws affecting vesting of school sections, 43 U.S.C. §§ 870-871 (1970), and those involving school indemnity selections, 43 U.S.C. §§ 851-852 (1970), were amended in 1932, 1954, 1956, 1958, 1960 and 1966, which amendments in the aggregate wrought major and significant changes. No change was made in the Department's practices of patenting school lands subject to a special grant railroad and of *North Dakota*, which precluded indemnity for such rights-of-way. Congress must therefore be deemed to have acquiesced in *North Dakota* for

some 85 years. The comments in *Wyoming v. Udall*, 379 F.2d 635 (10th Cir. 1967), *cert. denied*, 389 U.S. 985 (1967), are obiter dicta and the issues here were not present in that case.

To issue patent excluding the lands in the right-of-way would pose grave problems related to survey. The whole system of public land disposals is based upon the rectangular grid system. There is considerable question whether the school lands are "surveyed" to the extent that the right-of-way invaded any subdivision. If such subdivision be deemed unsurveyed, as indeed they would have to be, then title to that subdivision never vested in the State. Such a posture would cast a cloud upon the title of those individuals who acquired any interest therein from the State. In short, adoption of appellant's posture in this matter would probably create more problems than it would resolve.

Such a construction of the law would render regular subdivisions noncontiguous and thus militate against public land disposals. See *Frank C. Churchill*, 60 I.D. 447 (1950).

Similarly, the allowance of indemnity would frustrate the purpose of the 1922 Act, by leaving a narrow strip of land in federal ownership after the right-of-way was abandoned or forfeited.

We are not satisfied that a sufficient showing has been made by appellant to warrant a departure from universally accepted practice of

some 8 decades. Justice Frankfurter stated in the dissenting opinion in *United States v. Monia*, 317 U.S. 424, 431-32 (1943), as follows:

This question cannot be answered by closing our eyes to everything except the naked words of the Act \* \* \*. The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification. It is a wooden English doctrine of rather recent vintage (see Plucknett, *A Concise History of the Common Law*, 2d ed., 294-300; Amos, *The Interpretation of Statutes*, 5 Camb. L. J. 163; Davies, *The Interpretation of Statutes*, 35 Col. L. Rev. 519), to which lip service has on occasion been given here, but which since the days of Marshall this Court has rejected, especially in practice. *E.g.*, *United States v. Fisher*, 2 Cranch 358, 385-86; *Boston Sand Co. v. United States*, 278 U.S. 41, 48; *United States v. American Trucking Assns.*, 310 U.S. 534, 542-44. A statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. Especially is this true where the statute, like the one before us, is part of a legislative process having a history and a purpose. The meaning of such a statute cannot be gained by confining inquiry within its four corners. Only the historic process of which such legislation is an incomplete fragment—that to which it gave rise as well as that which gave rise to it—can yield its true meaning. \* \* \*

We hold that appellant is not entitled to a patent for school lands specifically excluding the lands covered by the right-of-way, but rather is entitled to a patent "subject to" such right-of-way. We further hold that the State is not entitled to indemnity for those portions of the school sections embraced in the right-of-way granted

by the Act of July 1, 1862, 12 Stat. 489, *as amended* by the Act of July 2, 1964, 13 Stat. 356.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

FREDERICK FISHMAN,  
*Administrative Judge.*

I CONCUR:

MARTIN RITVO,  
*Administrative Judge.*

CHIEF ADMINISTRATIVE JUDGE  
FRISHBERG DISSENTING:

I respectfully dissent from the holdings of the majority. This Department has no discretion to curtail the rights of a grantee, or to substitute its judgment for the will of Congress as manifested in granting acts. *West v. Standard Oil Co.*, 278 U.S. 200, 220 (1929); *Payne v. Central Pacific Ry. Co.*, 255 U.S. 228, 236 (1921). We are invested only with the power, judicial in nature, to ascertain whether the specified conditions of the grant in issue have been met. *Wyoming v. United States*, 255 U.S. 489, 496 (1921); *Payne v. New Mexico*, 255 U.S. 367, 371 (1921); *Lewis v. Hickel*, 427 F. 2d 673, 676 (9th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971); *Schraier v. Hickel*, 419 F.2d 663, 666-67 (D.C. Cir. 1969); *United States v. Arenas*, 158 F.2d 730, 747-48 (9th Cir. 1946), *cert. denied*, 331 U.S. 842 (1947). The majority acts in derogation of these limitations

by holding that (1) Wyoming should not receive indemnity for that portion of school land sections crossed by a railroad right-of-way granted under the Act of July 1, 1862, *as amended* by Act of July 2, 1864, and (2) a patent for school lands in place cannot exclude that right-of-way but must issue "subject to" it.

It is evident from judicial interpretation and legislative history that Wyoming, under its school land grant, § 4 of the Act of July 10, 1890, 26 Stat. 222, received no title to those lands within the right-of-way granted the Union Pacific Railroad by the 1862 Act, *as amended* in 1864, because those lands were specifically excluded from the school land grant as "otherwise disposed of." Even if that statutory exclusion had not been provided, the railroad's interest in the right-of-way was such an appropriation that those lands within the right-of-way were no longer public lands subject to sale or other disposition under the general land laws.

Both Wyoming's school land grant and the General Indemnity Act, 43 U.S.C. §§ 851, 852 (1970), provide for selection of lieu lands as indemnity for lands "otherwise disposed of." In light of the legislative purpose of that provision and the interpretation placed on it by the courts and this Department, this Board should overrule *State of North Dakota*, 13 L.D. 454 (1891), and uphold Wyoming's indemnity selection application, if it is proper in all other respects.

## SCHOOL LAND GRANT

Congressional policy providing for grants of numbered sections in every township of the public lands of the United States has been traced to the Ordinance of May 20, 1785, the first enactment for the sale of public lands within the western territories. It called for a rectangular survey system of the public lands prior to their sale and reserved sec. 16 in each township for the maintenance of the public schools in the respective township. Eliason, *Land Exchanges and State In-lieu Selections as They Affect Mineral Resource Development*, 21 Rocky Mt. Min. L. Inst. 635 (1975). By the Ordinance of 1787, a compact between the northwestern territories and the original states, reservation of the public lands for the maintenance of public schools became a fundamental principle. *Cooper v. Roberts*, 59 U.S. (18 How.) 338, 339 (1856). The compact declared that:

\* \* \* "religion, morality, and knowledge, [were] \* \* \* necessary for good government and the happiness of mankind;" and ordained that "schools, and the means of education, should be forever encouraged." \* \* \*

*Id.* Application of this principle was extended to the Mississippi Territory by Act of Apr. 7, 1798, 1 Stat. § 6 at 550, and in 1802 was applied to the southwestern territory by compact between the United States and Georgia. *Cooper v. Roberts*, *supra*.

By section 7 of the Statehood Act of Ohio, Act of Apr. 30, 1802, 2

Stat. 175, the first "school land grant" was made, providing:

\* \* \* That the section, numbered sixteen, in every township, and where such section has been sold, granted or disposed of, other lands equivalent thereto, and most contiguous to the same, shall be granted to the inhabitants of such township, for the use of the schools.

This grant provided the model for subsequent school land grants to the public-land states. *State of Oregon*, 18 L.D. 343, 345 (1894).

Starting with the school land grant to California by Act of Mar. 3, 1853, 10 Stat. 244, sec. 36 in each township was added to the school grants. *United States v. Morrison*, 240 U.S. 192, 198 (1916); *State of Oregon, supra*.<sup>1</sup> Under certain subsequent Statehood Acts, further sections were granted. Utah,<sup>2</sup> New Mexico,<sup>3</sup> and Arizona<sup>4</sup> received secs. 2 and 32, as well as 16 and 36, since most of their public domain

lands were desert areas. Oklahoma received additional secs. 13 and 33 within certain boundaries, for specified purposes.<sup>5</sup> Eliason, 21 Rocky Mt. Min. L. Inst., *supra* at 636.

As a result of this method of promoting education, over 78 million acres of the public domain were granted to the states for the support of their common schools. *Id.*

Wyoming, by sec. 4 of its Statehood Act of July 10, 1890, 26 Stat. 222, received:

\* \* \* sections numbered sixteen and thirty-six in every township of said proposed State, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools, such indemnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior \* \* \*.

Title to these school sections in place vested in Wyoming upon the date of statehood, July 10, 1890, or upon the completion and approval of survey of the particular sections, if the lands had not been surveyed prior to statehood. *United States v. Wyoming*, 331 U.S. 440, 443-44 (1947); *United States v. Stearns Lumber Co.*, 245 U.S. 436 (1918); *Wisconsin v. Lane*, 245 U.S. 427 (1918); *United States v. Morrison, supra*; *Minnesota v. Hitchcock*, 185 U.S. 373 (1902); *Heydenfeldt v. Daney Gold & Silver Mining Co.*,

<sup>1</sup> Grants of sec. 16 made between 1802 and 1846 were:

"Ohio (2 Stat. 175); Louisiana (2 Stat. 394, 5 Stat. 600); Indiana (3 Stat. 290); Mississippi (2 Stat. 234, 10 Stat. 6); Illinois (3 Stat. 430); Alabama (3 Stat. 491); Missouri (3 Stat. 547); Arkansas (5 Stat. 58); Michigan (5 Stat. 59); Florida (5 Stat. 788); Iowa (5 Stat. 789); Wisconsin (9 Stat. 58).

Grants of secs. 16 and 36, after 1846 include:

"California (10 Stat. 246); Minnesota (11 Stat. 167); Oregon (11 Stat. 383); Kansas (12 Stat. 127); Nevada (13 Stat. 32); Nebraska (13 Stat. 49); Colorado (18 Stat. 475); North Dakota, South Dakota, Montana, and Washington (25 Stat. 679); Idaho (26 Stat. 215); Wyoming (26 Stat. 222); Utah (28 Stat. 109); Oklahoma (34 Stat. 272); New Mexico (36 Stat. 561); Arizona (36 Stat. 572)."

*United States v. Morrison*, 240 U.S. 192, 198 (fns. 1 and 2) (1916).

<sup>2</sup> Act of July 16, 1894, 28 Stat. 107, 109.

<sup>3</sup> Act of June 20, 1910, 36 Stat. 557, 561.

<sup>4</sup> *Id.* at 572.

<sup>5</sup> Act of June 16, 1906, 34 Stat. 267, 274.

93 U.S. 634 (1876); *United States v. Wyoming*, 195 F. Supp. 692, 697-98 (D. Wyo. 1961), *aff'd.*, 310 F. 2d 566 (10th Cir. 1962), *cert. denied*, 372 U.S. 953 (1963); 43 CFR 2623.1; *see also*, *Wyoming v. United States*, 255 U.S. 489, 500-01 (1921); *Homer H. Harris*, 53 I.D. 584, 585 (1932). All the townships containing the school sections applied for under Wyoming's patent application, W-24998, had been surveyed prior to the date of statehood. Therefore, title vested in the respective sections as of July 10, 1890.<sup>6</sup>

Congress, by vesting the lands in the states in this manner, reserved absolute power over the school lands until their status was fixed by survey, the lands thereby being identified. *United States v. Morrison*, *supra*; *Heydenfeldt v. Daney Gold & Silver Mining Co.*, *supra*. Prior to survey, those sections were a part of the public domain which could be disposed of by the Government in any manner and for any purpose consistent with applicable federal statutes. *United States v. Wyoming*, 331 U.S. at 443. Therefore, it was inevitable that upon the date title vested in a state, prior claims to the lands would be found in some instances.

<sup>6</sup> The records of the Wyoming State Office, Bureau of Land Management, show the surveys of the townships were completed and approved as of the following dates: T. 14 N., R. 60 W.—Sept. 10, 1871; T. 13 N., R. 66 W.—Nov. 28, 1870; T. 14 N., R. 66 W.—Dec. 23, 1872; T. 13 N., R. 67 W.—Nov. 28, 1870; T. 13 N., R. 68 W.—Dec. 15, 1870; T. 13 N., R. 69 W.—Dec. 15, 1870; and T. 13 N., R. 70 W.—Nov. 15, 1872.

The Department has a statutory duty to issue school land grant patents to the states. *Navajo Tribe of Indians v. State of Utah*, 12 IBLA 1, 12, 80 I.D. 441, 445 (1973). The Act of June 21, 1934; 43 U.S.C. § 871a (1970), directs the Secretary of the Interior, upon application by a state, to issue patents to school sections granted for the support of common schools by any Act of Congress, where title has vested or may thereafter vest in the grantee state. *See generally* 43 CFR Subpart 2624. Such a patent is documentary evidence of title which has previously vested in the state. It is not a new grant. 43 CFR 2624.0-1; *Navajo Tribe of Indians v. State of Utah*, *supra*. The issuance of such a patent imports a conclusive determination by the Department of all facts necessary to the vesting of such title in the state, thereby divesting the Department of any further jurisdiction over the land. *West v. Standard Oil Co.*, 278 U.S. at 212-13; *Margaret Scharf*, 57 I.D. 348, 363 (1941).

Wyoming asserted in its application for patent that title vested to all the sections in place, except that area covered by the original main line right-of-way of the Union Pacific Railroad, granted by section 2, Act of July 1, 1862, 12 Stat. 489, *as amended* by Act of July 2, 1864, 13 Stat. 356. The record on appeal reveals that two of these school land sections, sec. 16, T. 13 N., R. 67 W., 6th P.M., and sec. 16, T. 13 N., R. 68 W., 6th P.M., are also traversed by additional rights-of-way

for spur lines granted to the Union Pacific Railroad under the authority of the General Railroad Right-of-Way Act of March 3, 1875, 43 U.S.C. § 934 (1970).

Wyoming's school land grant, § 4, 26 Stat. 222, excludes lands which were "sold or otherwise disposed of by or under the authority of any act of Congress." Moreover, once land is legally appropriated to any purpose it becomes severed from the mass of public lands and thereafter cannot be embraced or operated upon by subsequent law. *Wilcox v. Jackson*, 38 U.S. (13 Pet.) 266 (1839); see, e.g., *Scott v. Carew*, 196 U.S. 100 (1905); *Oregon & California R.R. Co. v. United States*, 190 U.S. 186 (1903); *Northern Pacific R.R. Co. v. Sanders*, 166 U.S. 620 (1897); *Wisconsin Central R'D Co. v. Forsythe*, 159 U.S. 46 (1895); *Whitney v. Taylor*, 158 U.S. 85 (1895); *Bardon v. Northern Pacific R.R. Co.*, 145 U.S. 535 (1892); *Wisconsin Central R.R. Co. v. Price Co.*, 133 U.S. 496 (1890); *Hastings & Dakota R.R. Co. v. Whitney*, 132 U.S. 357 (1889); *Kansas Pacific Ry. Co. v. Dunnmeyer*, 113 U.S. 629 (1885); *Newhall v. Sanger*, 92 U.S. 761 (1875); *Leavenworth, Lawrence & Galveston R.R. v. United States*, 92 U.S. 733 (1875); *A. W. Schunk*, 16 IBLA 191, 81 L.D. 401 (1974); *State of Alaska, Kenneth D. Makepeace*, 6 IBLA 58, 79 L.D. 391 (1972); *State of Utah (On Petition)*, 47 L.D. 359 (1920); *Andrew J. Billan*, 36 L.D. 334 (1908); but cf. *Buttz v. Northern Pacific R.R.*,

119 U.S. 55 (1886). As a result, title to those portions of the school land sections in issue which were unencumbered July 10, 1890, vested in the State as of that date. However, the question before this Board is what title, if any, vested in the State to those lands within the Union Pacific's rights-of-way granted under either (1) the Special Grant of 1862, as amended in 1864, or (2) the General Railroad Right-of-Way Act of 1875.

The Acts granting the railroad rights-of-way in issue are products of their times. *Great Northern Ry. Co. v. United States*, 315 U.S. 262, 273 (1942); *United States v. Union Pacific R.R. Co.*, 91 U.S. 72, 79 (1875). To understand the nature of these grants, it is necessary to review their creation and judicial interpretation.

#### RAILROAD RIGHTS-OF-WAY

In the first half of the nineteenth century, the United States acquired vast new lands in the South and West. Settlement and absorption of this sparsely populated territory into the older sections of the country became a national problem demanding a rapid and extensive means of transportation for both goods and people. *Krug v. Santa Fe Pacific R.R. Co.*, 329 U.S. 591, 592 (1947). In the thirties and forties, numerous suggestions were made in Congress of the possibility of future railroads being built to the Pacific. P. GATES, HISTORY OF PUBLIC LAND LAW DE-

VELOPMENT 363 (1968). (Hereinafter cited as GATES.)

Asa Whitney's plan for the building of a railroad from Milwaukee by way of South Pass to Puget Sound, first broached in 1844, brought the subject under consideration and from then until 1862 interest in the building of a Pacific railroad with Federal aid never subsided. \* \* \*

\* \* \* \* \*

Three steps seemed necessary before any actual route for a Pacific railroad could be adopted, a charter granted and a land donation made: first, a careful survey or at least reconnaissance of a possible route or routes through the Rocky Mountains and the Sierra Nevada and Cascade Ranges; second, the removal of the intruded Indians who had been concentrated along the eastern frontier of present Oklahoma, Kansas, and Nebraska; and third, the creation of one or more territories through which a railroad might be projected. All three steps were authorized by Congress in 1853 and 1854 and all three, particularly the creation of Kansas Territory, helped to bring about the sectional crisis that led directly to secession and the Civil War.

*Id.*

Beginning in 1850, Congress, to encourage a rapid railroad building program and to induce the construction of the much desired transcontinental route, embarked upon a policy of subsidizing railroad construction by lavish grants of the public domain.<sup>7</sup> *Great Northern Ry. Co. v. United States*, 315 U.S. at 273. However, even after the South's secession, there was still a

great deal of conflict in Congress over routes and termini of the proposed Pacific line. GATES, *supra* at 364. The issues were sufficiently resolved, though, to permit enactment of the Pacific Railroad Act, July 1, 1862, later liberalized by the Act of July 2, 1864. This grant made up, at least in part, for the Congressional delay in the fifties by encouraging the construction of one more transcontinental line. Some 2,720 miles of rights-of-way and 34,560,000 acres of the public lands were granted for that purpose. *Id.* at 367.

By these Acts, the main line was authorized to be constructed by the Union Pacific Railroad Company west through Cheyenne to the western boundary of Nevada, and possibly farther to meet the Central Pacific Railroad, which had been authorized to build from the Pacific coast eastward. *Stuart v. Union Pacific R.R. Co.*, 227 U.S. 342, 344-45 (1913); *Southern Pacific Co. v. City of Reno*, 257 F. 450, 455 (D. Nev. 1919), *aff'd*, 268 F. 751 (9th Cir. 1920). Five eastern branches of the Pacific railroad were to be built from Sioux City, Omaha, St. Joseph, Leavenworth, and Kansas City, to converge at some point on the 100th meridian. GATES, *supra* at 364. The obligation to converge with the main line on the 100th meridian was later eliminated when the Union Pacific, Eastern Division, was permitted to build from Kansas City due west to Denver. Then, the Denver Pacific line joined

<sup>7</sup> The first such grant was made to the Illinois Central and Mobile & Ohio Railroads by Act of Sept. 20, 1850, 9 Stat. 466.

that branch with the Union Pacific line at Cheyenne. *Id.*

This grant was only the beginning for the bars were down against such legislation. Seventy railroads received like grants, and 158,293,000 acres, an area almost equal in size to that of the New England states, New York and Pennsylvania, passed into the hands of western railroad promoters and builders.<sup>8</sup> *United States v. Union Pacific R.R. Co.*, 353 U.S. 112, 125 (1957) (dissenting opinion); *Krug v. Santa Fe Pacific R.R. Co.*, 329 U.S. fn. 2 at 592. Congress legislated offers the companies could accept or reject. The grants provided the inducement for their acceptance. *United States v. Union Pacific R.R. Co.*, 230 F.2d 690, 693 (10th Cir. 1956), *rev'd on other grounds*, 353 U.S. 112 (1957).

To ascertain the reasons for this congressional action, as well as the meaning of the particular provisions in the grants of this period, it is necessary to look to the circumstances existing at the time the acts were passed. Those circumstances have been aptly analyzed by the Supreme Court as follows:

\* \* \* The war of the rebellion was in progress; and, owing to complications with England, the country had become alarmed for the safety of our Pacific possessions. The loss of them was feared in case those complications should result in an open rupture; but, even if this fear were groundless, it was quite apparent

that we were unable to furnish that degree of protection to the people occupying them which every government owes to its citizens. It is true, the threatened danger was happily averted; but wisdom pointed out the necessity of making suitable provision for the future. This could be done in no better way than by the construction of a railroad across the continent. Such a road would bind together the widely separated parts of our common country, and furnish a cheap and expeditious mode for the transportation of troops and supplies. If it did nothing more than afford the required protection to the Pacific States, it was felt that the government, in the performance of an imperative duty, could not justly withhold the aid necessary to build it; and so strong and pervading was this opinion, that it is by no means certain that the people would not have justified Congress if it had departed from the then settled policy of the country regarding works of internal improvement, and charged the government itself with the direct execution of the enterprise.

This enterprise was viewed as a national undertaking for national purposes; and the public mind was directed to the end in view, rather than to the particular means of securing it. Although this road was a military necessity, there were other reasons active at the time in producing an opinion for its completion besides the protection of an exposed frontier. There was a vast unpeopled territory lying between the Missouri and Sacramento River which was practically worthless without the facilities afforded by a railroad for the transportation of persons and property. With its construction, the agricultural and mineral resources of this territory could be developed, settlements made where settlements were possible, and thereby the wealth and power of the United States largely increased; and there was also the pressing want, in time of peace even, of an improved and cheaper method for the transportation of the mails, and of supplies for the army and the Indians.

<sup>8</sup> "Other sources put the figure of federal grants-in-aid at 184,303,668 acres, equivalent to 209,849 square miles or 6.93 per cent of the area of the continental United States." *Krug v. Santa Fe Pacific R.R. Co.*, 329 U.S. 585, 592 (fn. 2) (1947).

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It was in the presence of these facts that Congress undertook to deal with the subject of this railroad. The difficulties in the way of building it were great, and by many intelligent persons considered insurmountable.

Although a free people, when resolved upon a course of action, can accomplish great results, the scheme for building a railroad two thousand miles in length, over deserts, across mountains, and through a country inhabited by Indians jealous of intrusion upon their rights, was universally regarded at the time as a bold and hazardous undertaking. It is nothing to the purpose that the apprehended difficulties in a great measure disappeared after trial, and that the road was constructed at less cost of time and money than had been considered possible. No argument can be drawn from the wisdom that comes after the fact. Congress acted with reference to a state of things believed at the time to exist; and, in interpreting its legislation, no aid can be derived from subsequent events. The project of building the road was not conceived for private ends; and the prevalent opinion was, that it could not be worked out by private capital alone. It was a national work, originating in national necessities, and requiring national assistance.

The policy of the country, to say nothing of the supposed want of constitutional power, stood in the way of the United States taking the work into its own hands. Even if this were not so, reasons of economy suggested that it were better to enlist private capital and enterprise in the project by offering the requisite inducements. Congress undertook to do this, in order to promote the construction and operation of a work deemed essential to the security of great public interests.

*United States v. Union Pacific R.R. Co.*, 91 U.S. at 79-81

The lavish granting policy reaped results, for in 1869 the Union Pa-

cific and Central Pacific Railroads together completed the first trans-continental route. GATES, *supra* at 374. With the realization of this goal, however, the public's mood of uncritical enthusiasm toward the railroads began to change. *United States v. Union Pacific R.R. Co.*, 353 U.S. at 126-27.

The West wanted internal improvements almost as much as it wanted free land and was nearly unanimous in supporting land grants for roads, canals, and railroads. Yet it had a phobia against "land monopoly." When it saw evidence that railroads were not prompt in bringing their lands on the market and putting them into the hands of farm makers, the West turned from warm friendship to outright hostility to the railroads. It began to demand, first an end to the practice of making land grants and, later, the forfeiture of unearned grants, partially earned grants, and finally, unsold grants. By the late sixties the same forces that had worked to end the treaty-making policy to obtain Indian lands were striving to halt the policy of making land grants to railroads. Reform-minded representatives from Illinois, Indiana, and other older public land states reflected anti-railroad feelings, raised to white heat by the Grangers' fight for railroad regulation and for the retention of the remaining public lands for actual settlers. Organized labor, speaking through its journal, the *Workingman's Advocate*, and the larger group of citizens who were coming to feel that the railroads had demanded too much of the government and had been arrogant towards the public, favored ending the practice of making railroad land grants. They were partly supported by Joseph S. Wilson, Commissioner of the General Land Office, and by President U. S. Grant himself, who expressed doubts about further donations.

After much heated argument in state capitals, in Washington, and in the press, and the presentation of petitions from the Legislatures of California, Wisconsin, Indiana, Missouri, Ohio, and Pennsylvania to the effect that land grants were a "violation of the spirit and interest of the national Homestead Law and manifestly in bad faith toward the landless." Congress acted. First, settlers' clauses were added to a number of railroad land grants requiring that the lands being granted be sold to settlers at no more than \$2.50 an acre. \* \* \*

GATES, *supra* at 380. Then on Mar. 11, 1872, public disfavor crystallized in the following declaration of policy by the House of Representatives:

"Resolved, That in the judgment of this House the policy of granting subsidies in public lands to railroads and other corporations ought to be discontinued, and that every consideration of public policy and equal justice to the whole people requires that the public lands should be held for the purpose of securing homesteads to actual settlers, and for educational purposes, as may be provided by Law." Cong. Globe, 42d Cong., 2d Sess., 1585 (1872). \* \* \*

*Great Northern Ry. Co. v. United States*, 315 U.S. at 273-74.

The last lavish railroad grant was made to the Texas Pacific Railroad Company in 1871. Thereafter, outright granting of the public lands to private railroads was discontinued. *Id.* at 273; GATES, *supra* at 380.

Congress, though, still wishing to encourage development of the West, passed special acts granting only rights-of-way through the public lands to certain railroads. Between 1871 and 1875 at least 15 such acts

were passed. *Great Northern Ry. Co. v. United States*, *supra*, fn. 9 at 274. It was because of the legislative burden caused by these special acts that Congress adopted a General Right of Way Statute, Mar. 3, 1875, 18 Stat. 482, 43 U.S.C. §§ 934-939 (1970).

The General Right of Way statute was significantly different from the Union Pacific Act of 1862 and its companion Acts. It granted neither alternate sections of the public land nor direct financial subsidy. However, the language of the Acts regarding the rights-of-way was identical in all important aspects. *Wyoming v. Udall*, 379 F.2d 635 (10th Cir.), *cert. denied*, 389 U.S. 985 (1967). But it is the nature of the railroads' estate in those rights-of-way that has been found to differ.

#### I. *Union Pacific Grant of 1862 and 1864.*

The grant of July 1, 1862, 12 Stat. 489, 491, gave a right-of-way 400 feet wide, "\* \* \* including all necessary grounds for stations, buildings, workshops, and depots, machine shops, switches, side tracts, turntables, and water stations," to the Union Pacific for construction of a railroad and telegraph line. The right, power, and authority was given to take earth, stone, timber, and other materials necessary for the roads' construction from lands adjacent to the right-of-way. The Act contained a further grant of 10 (20 under the Act of July 2, 1864, 13 Stat. § 4 at 358) odd-numbered sections of public land on each

side of the railroad line for each mile of railroad constructed. This was to aid "in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, \* \* \*." *Id.* § 3 at 492. In addition, Congress authorized loans of \$16,000, \$32,000 and \$48,000 in 6 percent, 30-year bonds for each mile constructed by the railroads under this grant, in exchange for a first mortgage on their lines. *Id.* § 5 at 492-93. The 1864 Act changed this to a second mortgage, enabling the railroads to sell their first mortgage bonds as well as the government bonds to finance construction. 13 Stat. §§ 10, 11 at 360-61; GATES, *supra* at 364.

The grant of alternate sections was a grant *in praesenti*, subject to the condition that if any of the sections had been sold, reserved, or otherwise disposed of by the United States, or to which a pre-emption or homestead claim had attached when the line of the road was definitely fixed, those sections did not vest in the railroad. 12 Stat. § 3 at 492; *Northern Lumber Co. v. O'Brian*, 204 U.S. 190 (1907); *Kansas Pacific Ry. Co. v. Dunmeyer*, 113 U.S. 629 (1885). It was congressional policy to keep the public lands open to occupation and pre-emption, and appropriation to public uses until those lands granted had been identified. In this way, settlement of the public domain was encouraged. *Railroad Co. v. Baldwin*, 103 U.S. 426, 429 (1880).

The estate in the right-of-way also vested *in praesenti*. However, it was not subject to any express conditions, only those necessarily implied, that the road be constructed and used for railroad purposes. *Id.* at 429-30. The right granted did not attach to any particular portion of the ground until the route was definitely located. In this respect the grant floated. However, when the route was definitely fixed, the railroad's title cut off all claims initiated subsequent to the date of the 1862 Act. *Southern Pacific Co. v. City of Reno*, 257 F. at 454. As a result, the public lands traversed by the right-of-way were not left open to appropriation before the line of the road was definitely fixed. All parties thereafter acquiring public lands took those lands subject to that right-of-way conferred for the proposed road. *Nadeau v. Union Pacific R.R. Co.*, 253 U.S. 442 (1920); *Bybee v. Oregon & California R.R. Co.*, 139 U.S. 663 (1891); *Railroad Co. v. Baldwin*, *supra*; *Churchill v. Choctaw Ry. Co.*, 46 P. 503 (Okla. 1896); *State of Wyoming*, 58 I.D. 128 (1942). The reason for this was that:

The right of way for the whole distance of the proposed route was a very important part of the aid given. If the company could be compelled to purchase its way over any section that might be occupied in advance of its location, very serious obstacles would be often imposed to the progress of the road. For any loss of lands by settlement or reservation, other lands are given; but for the loss of the right of way by these

means, no compensation is provided, nor could any be given by the substitution of another route.

*Railroad Co. v. Baldwin*, 103 U.S. at 430.

Where loss of the lands within the right-of-way occurred before the grant, condemnation of that way was provided for by the amendatory Act of July 2, 1864. *Union Pacific R.R. Co. v. Harris*, 215 U.S. 386, 390 (1910).

All mineral lands were excepted from the operation of the 1862 Act grant of the alternate sections. 12 Stat. § 3 at 492. This exception was found applicable by the Supreme Court to § 2 of the same Act, implying a reservation of the minerals underlying the right-of-way in the United States. *United States v. Union Pacific R.R. Co.*, 353 U.S. 112 (1957). However, the Act of July 2, 1864, 13 Stat. 356, 358, provided that the term "mineral lands" used in either the 1862 or 1864 Acts did not include coal and iron land. This exception has been interpreted by the courts as applying to both the right-of-way and alternate section grants, giving the railroad the right to explore, develop, and mine any coal and iron lying therein. *Wyoming v. Udall*, 379 F. 2d 635, 640 (10th Cir.), *cert. denied*, 389 U.S. 985 (1967).

#### A. *Estate in the Right-of-Way*

It is not surprising, in view of the lavish granting policy during the 1850-1871 period, that the grant of alternate sections of the public lands has been regarded as an outright grant to the railroad, and that the rights-of-way grant has been

deemed as vesting the railroad with more than an easement yet less than a fee simple absolute. *Great Northern Ry. Co. v. United States*, 315 U.S. fn. 6 at 273; *Rice v. United States*, 348 F. Supp. 254, 256 (D.N.D. 1972) *aff'd*, 479 F. 2d 58 (8th Cir.), *cert. denied*, 414 U.S. 858 (1973); *Brown W. Cannon, Jr.*, 24 IBLA 166, 83 I.D. 80 (1976).

In a line of decisions dating back to *Railroad Co. v. Baldwin*, 103 U.S. 426 (1880), the Supreme Court consistently recognized that the Act of 1862 and its companion acts vested the railroads with the entire present interest in the right-of-way, covering both possession and fee. *Missouri, Kansas & Texas Ry. Co. v. Roberts*, 152 U.S. 114 (1894). The term "right-of-way" was recognized as having two distinct meanings: (1) a mere right of passage (an easement), and (2) that strip of land taken by the railroad to construct its roadbed, that is, the land itself, not the right of passage over it. *New Mexico v. United States Trust Co.*, 172 U.S. 171, 182 (1898). The rights-of-way grants of the 1850-1871 period fell into the latter category. *Id.* The Court in *New Mexico v. United States Trust Co.* observed that if the railroad's interest in the right-of-way was an easement, it was \* \* \* "one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal, property." *Id.* at 183. However, regardless of what they were called, the rights-of-way grants of the 1850-1871 period were found to be "in substance, an interest in the

land, special and exclusive in its nature.' " \* \* \* *Western Union Telegraph Co. v. Pennsylvania R.R. Co.*, 195 U.S. 540, 570 (1904). It was in *Northern Pacific Ry. Co. v. Townsend*, 190 U.S. 267 (1903), that the railroad's interest was labeled as being, in effect, a "limited fee estate," (also known as a base, qualified, or determinable fee), made on an implied condition of reverter in the event that the company ceased to use or retain the land for railroad purposes.

In general usage, the limited fee estate is a fee simple created with a special limitation. L. M. SIMES, *Law of Future Interests* 28-29 (2d ed. 1966). Upon the happening of the event named in that special limitation, the estate automatically terminates, and the property reverts to the grantor or his successors in interest, without the necessity for reentry. *Id.*; 1 TIFFANY *REAL PROPERTY* § 220 (3d ed. 1939). In granting such an estate the grantor is left with a future interest, called a possibility of reverter. Therefore, upon cessation of the use of the right-of-way for railroad purposes, the railroad's title automatically terminates, and the United States, holder of the possibility of reverter, becomes vested with the title.

*Townsend* involved the question of whether third parties could establish valid homesteads on a right-of-way acquired pursuant to the Act of July 2, 1864, 13 Stat. 356, after that road had been located and the tracks laid. The Court found that the land forming the right-of-way, being a limited fee in

the railroad, had been taken out of the category of public lands subject to preemption and sale, and the land department was without authority to convey any rights within such right-of-way to subsequent parties. Therefore, even though the homestead grant "was of the full legal subdivisions," it did not convey any interest or estate in the right-of-way granted to and possessed by the railroad pursuant to the 1864 Act. *Accord*, *E. A. Crandall*, 43 L.D. 556 (1915). *Contra*, *Crandall v. Goss*, 30 Idaho 661, 167 P. 1025 (1917); *Annot.*, 136 A.L.R. 296, 315-16 (1942).

The limited fee theory was later examined in *United States v. Union Pacific R.R. Co.*, 353 U.S. 112 (1957), a suit brought by the United States to enjoin the railroad from drilling for oil and gas on a right-of-way granted by § 2 of the 1862 Act. The Court observed that *Townsend* was not "an adjudication concerning the ownership of mineral resources underlying the right of way in a contest between the United States and the railroad." *Id.* at 118. The earlier limited fee cases were regarded as deciding at most " \* \* \* that the railroads received all surface rights to the right-of-way and all rights incident to a use for railroad purposes." *Id.* at 119; *accord*, *Solicitor's Opinion*, 58 L.D. 160 (1942). This decision, however, did not overrule *Townsend* or change its effect on a holder of a patent issued after the land had been traversed by a railroad under such a right-of-way grant. *Rice v. United States*, *supra*; *Wyoming v. Udall*, 379 F.2d 635 (10th Cir.),

*cert. denied*, 389 U.S. 985 (1967); *Kunzman v. Union Pacific R.R. Co.*, 169 Colo. 374, 456 P. 2d 743 (1969), *cert. denied*, 396 U.S. 1039 (1970); *Brown W. Cannon, Jr.*, 24 IBLA 166, 83 I.D. 80 (1976).

The limited fee label came under scrutiny again in *Wyoming v. Udall*, *supra*,<sup>9</sup> a suit involving the question whether the Secretary of the Interior had the authority under the Right-of-Way Leasing Act of May 21, 1930, 30 U.S.C. § 301 *et seq.* (1970) to dispose of oil and gas deposits underlying an 1862 Act railroad right-of-way, where the lands traversed by the right-of-way had been granted to Wyoming as school lands. The court observed that:

For the purposes of this case, we are not impressed with the labels applied to the title of the railroads in their rights-of-way across the public lands of the United States. The concept of "limited fee" was no doubt applied in *Townsend* because under the common law, an easement was an incorporeal hereditament which did not give an exclusive right of possession. With the expansion of the meaning of easement to include, so far as railroads are concerned, a right in perpetuity to exclusive use and possession \* \* \* the need for the "limited fee" label disappeared.<sup>[10]</sup>

379 F.2d at 640

The court, in analyzing the railroad's easement, observed that it was in a different category from

that of a "surface easement." The 1864 amendment to the 1862 Act provided that the term "mineral lands" did not include coal and iron lands. As a result, the railroad not only received the right-of-way with perpetual and exclusive use of the surface, but also received a grant of coal and iron with the incidental rights of exploration and development. It was this latter grant that the court found excluded the right-of-way lands from the subsequent school land grant to the State.

Wyoming's Enabling Act, as previously noted, granted sections 16 and 36 in each township. Where those sections, or any part thereof, had been "sold or otherwise disposed of by or under the authority of any act of Congress," indemnity lands could be selected. 26 Stat. § 4 at 223. The railroad's interest in the right-of-way was such that the land in and under the way fell into the category of "otherwise disposed of by or under the authority of any act of Congress." *Wyoming v. Udall*, *supra*; *accord*, *Union Pacific Ry. Co. v. Karges*, 169 F. 459 (D. Neb. 1909); *State of Wyoming*, 58 I.D. 128 (1942); *cf.* *Sherman v. Buick*, 93 U.S. 209 (1876); *State of Utah (On Petition)*, 47 L.D. 359 (1920); *Andrew J. Billan*, 36 L.D. 334 (1906). Therefore, when the United States, holder of the servient estate under the right-of-way, granted the school sections to the State, the title to that servient estate did not pass. Instead, it remained in the United States, which retained the rights not granted to the railroad, specifically, ownership of the underlying oil and gas deposits.

<sup>9</sup> Dismissed appeal taken from the departmental decision *Union Pacific R.R. Co.*, 72 I.D. 76 (1965).

<sup>10</sup> Such an easement is an interest in land conferring upon the holder thereof the lawful use of or over the estate of another. 7 THOMPSON ON REAL PROPERTY § 3183 (Repl. 1962). The estate encumbered by that easement is referred to as the servient tenement or servient estate.

*Wyoming v. Udall, supra; accord, Brown W. Cannon, Jr., supra; Solicitor's Opinion*, 58 I.D. 160 (1942).

In *Rice v. United States*, 348 F. Supp. 254 (D.N.D. 1972), *aff'd*, 479 F.2d 58 (8th Cir.), *cert. denied*, 414 U.S. 858 (1973),<sup>11</sup> the controversy arose whether the servient estate under a railroad right-of-way granted by § 2 of the Act of July 2, 1864, 13 Stat. 365, passed to a subsequent patentee, when no exception was made of that tract in the patent issued. The issue again involved ownership of oil and gas underlying the right-of-way.

The court refrained from definitely labeling the railroad's interest in the right-of-way, saying that it got either a limited fee or an easement, but "[i]n any event, it got something less than a fee simple by the filing and approval of a right of way plat, and a construction of the railway." 348 F. Supp. at 256. However, the court found that, regardless of the label applied, this was an appropriation within the rule originated in *Wilcox v. Jackson*, 38 U.S. (13 Pet.) 266 (1839). The tracts had been lawfully appropriated to a purpose that severed them from the mass of public lands, so that no subsequent law or proclamation could embrace them or operate on them. Even though no exception had been made of it in the patent, title to the servient estate remained in the United States, leaving the oil and gas interests subject to leasing under the 1930 Right-of-Way Leas-

ing Act. *Accord, Brown W. Cannon, Jr., supra.*

*B. Effect of 1862 and 1864 Acts Right-of-Way on Subsequent School Land Grant; Patents.*

In the case presently under consideration, Wyoming's title to the sections in issue, attaching in 1890, vested subsequent to the Union Pacific's title, which vested in 1862. In light of the foregoing decisions, Wyoming, under that school land grant, received no title to the lands within that 1862 right-of-way grant. Even if its school land grant had not specifically excluded those lands as "otherwise disposed of," the grant was of "public lands," and the lands within the right-of-way were no longer such lands. The term "public lands" has been habitually used by Congress to describe lands subject to sale or other disposal under the general laws, and not reserved or held back for any special governmental or public purpose. *Borax Ltd. v. Los Angeles*, 296 U.S. 10, 17 (1935); *Union Pacific R.R. Co. v. Harris*, 215 U.S. at 388; *Barker v. Harvey*, 181 U.S. 481, 490 (1901); *Newhall v. Sanger*, 92 U.S. 761, 763 (1875); *Ben J. Boschetta*, 21 IBLA 193 (1975).<sup>12</sup> The railroad's interest, regardless of its label, was such an appropriation that the lands in the right-of-way were not subject to sale or other dis-

<sup>11</sup> The term public land is sometimes used in a sense which includes certain lands where the United States has retained the title, for example, Indian lands. *Larkin v. Paugh*, 276 U.S. 431, 438 (1928); *Nadeau v. Union Pacific R.R. Co.*, 253 U.S. 442, 444 (1920); *Kindred v. Union Pacific R.R. Co.*, 225 U.S. 582, 596 (1912).

<sup>12</sup> Affirmed departmental decision, *George W. Zarak*, 4 IBLA 82 (1971).

position under the general land laws. *Rice v. United States, supra*. Therefore, the subsequent school land grant to Wyoming did not operate upon them.<sup>13</sup>

<sup>13</sup> Examples of other interests which have segregated the public lands from disposition under subsequent school land grants: (1) A railroad indemnity selection, made in accordance with the law, segregated the public lands during its pendency. *Minnesota v. Immigration Land Co.*, 46 L.D. 7 (1916). A railroad selection application filed to exchange lands excluded those lands selected from a subsequent school land grant. *Santa Fe Pacific R.R. Co.*, 41 L.D. 96 (1912). (2) Existing homestead entries or valid settlements at the date of survey severed the land from the public domain so that the lands were not subject to school land grants. *State of Utah (On Petition)*, 47 L.D. 359 (1920); *Fannie Lipscomb*, 44 L.D. 414 (1915); *Andrew J. Billan*, 36 L.D. 334 (1906); see *Circular Instructions of November 7, 1879*, 2 Codd's Land Law 715 (1882). The filing of a declaratory statement for purposes of a homestead entry was sufficient to segregate the lands. *John P. Butler*, 38 L.D. 172 (1909). However, a settler's mere occupancy of the lands generally did not segregate them from subsequent disposition. *Gonzales v. French*, 164 U.S. 338 (1896). An exception is found in regard to settlements in California, where under its Enabling Act, occupancy by erection of a dwelling house or by cultivation prior to survey was sufficient to segregate the lands. *Mining Co. v. Consol. Mining Co.*, 102 U.S. 167 (1880). (3) Lands set aside for Indian Reservations prior to survey, with the Indians remaining in occupancy, excluded such lands from subsequent school land grants. *United States v. Stearns Lumber Co.*, 245 U.S. 436 (1918); *Wisconsin v. Lane*, 245 U.S. 427 (1918); *Minnesota v. Hitchcock*, 185 U.S. 373 (1902); *Missouri, Kansas & Texas Ry. Co. v. Roberts*, 152 U.S. 114 (1894); *State of Colorado*, 6 L.D. 412 (1887). Where Indians have a right of occupancy until required to leave by Presidential order, that right was sufficient to segregate the lands from subsequent disposition. *Wisconsin v. Hitchcock*, 201 U.S. 202 (1906); *Henry Sherry*, 12 L.D. 176 (1890). However, if the lands were abandoned before survey, they were within the public domain subject to the school land grant. *Beecher v. Wetherby*, 95 U.S. 517 (1877). (4) A reservation of lands under governmental authority, such as for petroleum, forest or military purposes, occurring before survey of the lands had been formally approved, excluded those lands from subsequent disposition. *United States v.*

The Act of June 21, 1934, 43 U.S.C. § 871a (1970), directs the Secretary to issue patents, upon the application of a state, where title has vested or may thereafter vest in the grantee state. Wyoming applied for patent excluding only those portions of the school land sections covered by the Union Pacific's 1862 Act right-of-way. The Bureau, in rejecting this application, relied on the following two reasons: (1) patents must issue for lands described by full legal subdivisions in accordance with an official government survey; and (2) the State took title to the lands in place subject to the right-of-way, citing *State of Wyoming*, 58 I.D. 128 (1942). Neither reason is proper for rejection of this patent application. It is true Wyoming took title to the school sections in place subject to or subordinate to the railroad's estate in the right-of-way. *Railroad Co. v. Baldwin*, 103 U.S. 426 (1880); *State of Wyoming, supra*. However, this "subject to" language is not indicative of any title or estate vesting in the State to the lands within the right-of-way. See *State of Wyoming, supra*. It establishes only the railroad's priority of interest over subsequent grantees. *Railroad Co. v. Baldwin, supra*.

*Wyoming*, 331 U.S. 440 (1947); *United States v. Morrison*, 240 U.S. 192 (1916); *Gregg v. State of Colorado*, 15 L.D. 151 (1892). (5) Lands within the limits of a confirmed Spanish land grant were disposed of and were not subject to the school land grant to the state. *State of Florida*, 30 L.D. 187 (1900). (6) Lands patented to a mining claimant, whose claim was initiated prior to survey, vested in the claimant, giving him better title than the state under its school land grant. *Heydenfeldt v. Daney Gold & Silver Mining Co.*, 93 U.S. 634 (1876).

It has been the practice of the Department, where Congress has not specifically provided otherwise, to conform all disposals of the public lands to subdivisions established by government survey, and to treat minor subdivisions as indivisible for all administrative purposes.<sup>14</sup> *Southern Pacific R.R. Co. v. Fall*, 257 U.S. 460, 462 (1922); *Martin J. Plutt*, 61 I.D. 185, 187 (1953); *James A. Power*, 50 L.D. 392, 394-95 (1924); *Elisha B. Martin*, 16 L.D. 424 (1892).

The public lands are surveyed and platted, as nearly as may be, into rectangular tracts, known as sections, half sections, quarter sections, half-quarter sections, and quarter-quarter sections; and, where the lines of the survey are interrupted by lakes, public reservations, Spanish or Mexican grants, state or territorial lines, etc., the irregular tracts at the point of interruption are platted and known as fractional sections, etc., or as lots having particular numbers. After the survey the land officers dispose of the lands only according to these legal subdivisions—that is, as sections half sections, etc.—and regard the minor subdivisions—quarter-quarter sections and lots—as not subject to further division, save in exceptional instances where Congress has specially provided otherwise. Under this practice a right to purchase or enter 40 acres may be exercised by taking a full quarter-quarter section, but not by taking a part only of each of two or more minor subdivisions. And the same rule is applied to relinquishments

and lieu selections; that is to say, a right to relinquish land to which title has been acquired and to take other land in its stead may not be exercised by exchanging less than a legal subdivision at a time.

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\* \* \* \* \*

The manner of keeping the land office records—which is according to a system of “tract books,”—and the mode of checking up and tracing the various land transactions, have long been adjusted to this practice; and in the judgment of the land officers adherence to it is of much importance.

*Southern Pacific R.R. Co. v. Fall*, 257 U.S. at 462-63.

However, this administrative practice applies only to disposals of the public lands, that is to say, to regulation of the granting of title. *Work v. Central Pacific Ry. Co.*, 12 F. 2d 834 (D.C. Cir. 1926); see *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963); *Wayne N. Mason*, 61 I.D. 25, 27 (1952); *Martin J. Plutt*, *supra*; *State of Arizona*, 53 I.D. 149, 150 (1930); *James A. Power*, *supra*; *Instructions*, 39 L.D. 565 (1911); *James H. Harte*, 33 L.D. 53 (1904); *Melder v. White*, 28 L.D. 412 (1899). It is not applicable to lands to which a grantee acquired previous title by an express statutory contract. *Work v. Central Pacific Ry. Co.*, *supra*; *Clinton C. Reed*, 45 L.D. 646 (1917). It is one thing to regulate the granting of title, and another to regulate title which has already vested, for the Department can neither enlarge nor curtail the rights of a grantee. *West v. Standard Oil Co.*, 278 U.S. at 220; *Payne v. New Mexico*, 255 U.S. at 236; *Work v.*

<sup>14</sup> However, in special circumstances, a segregative survey will be ordered where adherence to this general rule would not serve any public interest and the disposal of less than a legal subdivision of public land allowed. *Thomas Owen Westbrook*, 60 I.D. 296 (1949); *Rubert Ray Spencer*, 60 I.D. 198 (1948); *State of Arizona*, 53 I.D. 149 (1930); *Lewis A. Gould*, 51 L.D. 131 (1925); *Chambers v. Hall*, 49 L.D. 203 (1922); cf. *James A. Power*, 50 L.D. 392 (1924).

*Central Pacific Ry. Co., supra* at 836.

Had Wyoming applied for patent for whole school land sections, such application might have been proper where title to the lands within the right-of-way "may hereafter vest" in the State. 43 U.S.C. § 871a (1970). Such a possibility might have occurred pursuant to the Act of Mar. 8, 1922, 42 Stat. 414, 43 U.S.C. § 912 (1970), which provides that upon extinguishment of such railroad rights-of-way, whether by forfeiture or abandonment, "declared or decreed by a court of competent jurisdiction or by Act of Congress," title thereto vests in:

\* \* \* any person, firm, or corporation, assigns, or successors in title and interest to whom or to which title of the United States may have been or may be granted, conveying or purporting to convey the whole of the legal subdivision or subdivisions, traversed or occupied by such railroad, \* \* \* except lands within a municipality the title to which, upon forfeiture or abandonment, as herein provided, shall vest in such municipality, and this by virtue of the patent thereto and without the necessity of any other or further conveyance or assurance of any kind or nature whatsoever \* \* \*.<sup>15</sup>

However, Wyoming did not seek such a patent, and no power lies in the Department pursuant to § 4 of Wyoming's Statehood Act, 26 Stat. 222, or the Act of June 21, 1934, 43 U.S.C. § 871a, to compel the issuance of a patent including the right-of-way area, or to refuse the issuance of the patent requested, simply because it contravenes the

administrative practice of the Department. *Work v. Central Pacific Ry. Co., supra* at 834.<sup>16</sup>

Therefore, I would hold that patent should issue to Wyoming for those sections requested, excluding that area traversed by the 1862 Act right-of-way of the Union Pacific Railroad, where the specific conditions of the grant have been met.

## II. General Right-of-Way Statute of 1875.

As mentioned before, the General Right-of-Way Statute of March 3, 1875, 18 Stat. 482, 43 U.S.C. §§ 934-

<sup>15</sup> The Department, in response to *Work v. Central Pacific Ry. Co.*, 12 F.2d 834 (D.C. Cir. 1926), issued *Instructions*, 51 L.D. 487 (1926), regarding the right of land-grant railroad companies to list less than a legal subdivision, insofar as related to the odd numbered sections within the primary limits of the railroad grant. Thereafter, those lists submitted for less than a legal subdivision were to be accepted where no other objection appeared. Further recommended was the listing of such lands by aliquot parts of a subdivision, "such as the NE  $\frac{1}{4}$  of NE  $\frac{1}{4}$  of NE  $\frac{1}{4}$  (10 acres), or S  $\frac{1}{2}$  of NE  $\frac{1}{4}$  of NE  $\frac{1}{4}$  (20 acres)," unless a survey to segregate the tract chosen could not be avoided. See generally BLM MANUAL OF SURVEYING INSTRUCTIONS 159 (1973).

The provision regarding the assignment of cost for the survey in the *Instructions, supra*, was modified by *Central Pacific Ry. Co. (On Petition)*, 52 L.D. 235 (1927). See generally 43 U.S.C. § 757 (1970).

The identity of land included within a patent is ascertained by giving a reasonable construction to the entire description in the patent. *Boardman v. Reed*, 31 U.S. (8 Pet.) 325, 344 (1832). I see no legal imperative for a segregative survey in the issuance of a school land grant patent for sections traversed by an 1850-1871 period railroad right-of-way. A clause generally excluding those lands included within such a right-of-way would appear to provide sufficient description for identity of the State's title in the sections granted. It would therefore seem that there is no impediment to an alteration of present departmental policy regarding exclusions in patents, thus avoiding the expense and administrative delay which would be incurred in the accomplishment of segregative surveys solely for the purpose of the form of the patent.

<sup>16</sup> It is questionable whether this Act applies to a state, since its operation is expressly limited to "any person, firm, or corporation \* \* \*."

939 (1970), replaced the earlier practice of granting rights-of-way, additional public lands and direct financial aid to individually named railroad companies. This statute granted only:

The right of way through the public lands of the United States \* \* \* to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same \* \* \*.

43 U.S.C. § 934 (1970). The public lands adjacent to such rights-of-way were granted for station buildings, depots, etc., not in excess of 20 acres per station, and the right to take material, earth, stone, and timber necessary for the construction of the road from the public lands adjacent to the line was given. *Id.*

This grant of the rights-of-way and station grounds through the public domain was an *in praesenti* grant of land to be thereafter identified. *Stalker v. Oregon Short Line*, 225 U.S. 142, 146 (1912); *Jamestown & Northern R.R. Co. v. Jones*, 117 U.S. 125, 131 (1900). The specific grant was secured to the railroad as against subsequent grantees upon definite location of the line and permanent appropriation of the right-of-way. This could be accomplished by actual construction, which has been described as such construction as manifested that the railroad had exercised its judgment as to the location of its line and had done sufficient work to fix the position of the route and to

consummate the purpose for which the grant was given. *Barlow v. Northern Pacific Ry. Co.*, 240 U.S. 484, 488 (1916); *Stalker v. Oregon Short Line*, *supra* at 150. The degree of construction which satisfied this definition ranged from the beginning of construction by grading the roadbed to the completion of the line. *Barlow v. Northern Pacific Ry. Co.*, *supra*; *Jamestown & Northern R.R. Co. v. Jones*, *supra*. However, in *Minneapolis, St. Paul & Ry. Co. v. Doughty*, 208 U.S. 251 (1908), a preliminary survey for the line was found insufficient, since it was only "a mere location movable at the will of the company" and not actual construction necessarily fixing the road's position.

Where the railroad desired to secure the grant in advance of construction, it had to do three specific things: (1) make a definite location of its route, (2) file a profile map of its line with the register of the local land office, and (3) obtain the approval of that map by the Secretary of the Interior. Act of Mar. 3, 1875, 18 Stat. § 4 at 483; *Minneapolis, St. Paul & Ry. Co. v. Doughty*, *supra*; *Jamestown & Northern R.R. Co. v. Jones*, *supra*. The approved map was intended by the Act to be the equivalent of a patent defining the grant. *Great Northern Ry. v. Steinke*, 261 U.S. 119, 125 (1923). However, the title related back, as against intervening claims, to the date when the profile map was filed in the local land office. *Id.*; *Stalker v. Oregon Short Line*, *supra*. Therefore, claims raised subsequent to such filing were subordinate to the railroad's

right-of-way. *Stalker v. Oregon Short Line, supra.*

#### A. Estate in the Right-of-Way

Initially, the Department construed the Act of 1875 as creating an easement which did not sever the lands from the public domain. The first such interpretation was in the general right-of-way circular of Jan. 13, 1888, which stated, in part, that:

The act of Mar. 3, 1875, is not in the nature of a grant of lands; it does not convey an estate in fee, either in the "right of way" or the grounds selected for depot purposes. It is a right of use only, the title still remaining in the United States.

12 L.D. 423, 428 (1888). The same position was taken by later departmental regulations of Mar. 21, 1892, 14 L.D. 338 and Nov. 4, 1898, 27 L.D. 663. *Great Northern Ry. Co. v. United States*, 315 U.S. at 275.<sup>17</sup> However, apparently in response to *Northern Pacific Ry. Co. v. Townsend*, 190 U.S. 267 (1903), a shift in departmental interpretation was reflected in the Circular of Feb. 11, 1904, 32 L.D. 481. Therein, the railroad's interest in an 1875 Act right-of-way was described as a base or qualified fee. But the Department returned to the easement theory in *Grand Canyon Ry. Co. v. Cameron*, 35 L.D. 495, 497 (1907), relying on

the earlier departmental decision of *John W. Wehn*, 32 L.D. 33 (1903). This reassertion was reflected in departmental regulations of May 21, 1909, 37 L.D. 787. However, the interpretation was again changed pursuant to the Supreme Court's decision in *Rio Grande Western Ry. Co. v. Stringham*, 239 U.S. 44 (1915).

The *Stringham* case involved a suit brought by the railroad company to quiet title to lands under an 1875 Act right-of-way, where the defendants asserted title thereto under a patent issued for a placer mining claim. The Court, in affirming judgment in favor of the railroad, relied on the limited fee analysis of *Townsend*, finding that:

The right of way granted by this and similar acts is neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted, and carries with it the incidents and remedies usually attending the fee.\* \* \*

*Id.* at 47.

The Department responded accordingly, and after 1915 administrative construction bowed to the *Stringham* analysis. *Contra*, 43 CFR 243.2 (1938).<sup>18</sup> *Instructions*, 46 L.D. 429 (1918), issued stating that homestead entrymen were no longer considered to have any interest in lands traversed by such a right-of-way. Mining claims em-

<sup>17</sup> Congressional approval of this administrative interpretation was indirectly given when the language of the 1875 Act was repeated in the grant of rights-of-way to canal and reservoir companies, Act of Mar. 3, 1891, 26 Stat. 1101, and when the 1875 Act was made partially applicable to the Colville Indian Reservation by Act of Mar. 6, 1896, 29 Stat. 44. *Great Northern Ry. Co. v. United States*, 315 U.S. 262, 275-76 (1942).

<sup>18</sup> The regulations, 43 CFR 243.2 (1938), reasserted the easement language of the May 21, 1909, regulations, 37 L.D. 787, 788.

bracing tracts traversed by an 1875 Act right-of-way, carried neither title to the land within the way nor any interest in the mineral deposits thereunder. *A. Otis Birch (On Rehearing)*, 53 I.D. 340 (1931); *United States v. Bullington (On Rehearing)*, 51 L.D. 604 (1926); *Lewis A. Gould*, 51 L.D. 131 (1925). When conflict arose between the United States and a railroad company as to the title to oil and gas deposits underlying an 1875 Act right-of-way, the railroad's interest, construed as a limited fee, did not include the right or title to the oil and gas deposits thereunder. *Solicitor's Opinion*, 56 I.D. 206 (1937).

In 1942 the Supreme Court effectively overruled *Stringham* in *Great Northern Ry. Co. v. United States*, 315 U.S. 262 (1942), a suit instituted by the United States to enjoin Great Northern from drilling for or removing the oil and gas underlying its right-of-way, granted pursuant to the 1875 Act.

The Court, in analyzing *Stringham*, noted that:

The conclusion that the railroad was the owner of a "limited fee" was based on cases arising under the land-grant acts passed prior to 1871, and it does not appear that Congress' change of policy after 1871 was brought to the Court's attention.\* \* \*

*Id.* at 279. The language of the Act, its legislative history, its early administrative interpretation and the construction placed on it by Congress in subsequent legislation were all found to be inconsistent with

such a limited fee analysis. The Court, when discussing the language of the 1875 Right-of-Way Act, found § 4 thereof particularly illustrative. That section required notation of the location of each right-of-way on the plats in the local land office. Thereafter, "all such lands *over* which such right of way shall pass *shall be disposed of subject to* such right of way." 18 Stat. § 4 at 483. (*Italics added.*) The Court observed that:

\* \* \* This reserved right to dispose of the lands subject to the right of way is wholly inconsistent with the grant of the fee. As the court below pointed out, "After words to indicate the intent to convey as easement would be difficult to find." That this was the precise intent of § 4 is clear from its legislative history. \* \* \*

*Great Northern Ry. Co. v. United States*, *supra* at 271.

The fact that the 1875 Act was designed to permit the construction of the railroads through the public domain to enhance their value and hasten their settlement did not compel a construction of such a right-of-way grant as conveying a fee in the land and underlying minerals. *Id.* at 272. The Court recognized that the railroad could be operated, though its right-of-way was but an easement, and Great Northern's interest was construed as being clearly only an easement, conferring no right to the oil and minerals underlying the right-of-way. The title to the mineral estate remained in the United States, with the railroad free to apply for a lease on the oil

and gas deposits pursuant to the Right-of-Way Leasing Act of May 21, 1930.

In 1958 the Court of Appeals for the Tenth Circuit found *Great Northern's* easement analysis was not limited to contests involving the Government. *Chicago & North Western Ry. Co. v. Continental Oil Co.*, 253 F.2d 468 (10th Cir. 1958). In this dispute the railway company and its oil and gas lessee had sought reversal of a lower court's decision in favor of Continental Oil Company, 148 F. Supp. 411 (D. Wyo. 1957). Continental Oil had originally filed the suit to enjoin them from trespassing on the servient estate. Continental was the assignee of non-federal oil and gas leases on two 40-acre tracts traversed by the right-of-way. One tract had been patented by the United States to the state as part of a university land grant, and the other had been patented by the United States into private ownership. The lower court, in granting the injunction requested, found the railroad had acquired only an easement. Therefore, it had no right to the oil and gas or other minerals underlying its way. The Tenth Circuit, in affirming that judgment, found that:

\* \* \* Upon the filing of the location map, the railroad acquired an easement for railroad purposes. The fee or servient estate, including the minerals, remained in the United States. See *Himonas v. Denver & R. G. W. R. Co.*, supra [179 F.2d 171 (10th Cir. 1949)]. A severance of the minerals from the surface or dominant

estate in the right of way was thereupon effected \* \* \*.

253 F. 2d at 472.

This Board, in *Amerada Hess Corp.*, 24 IBLA 360, 83 I.D. 194 (1976), recognizing the easement theory of *Great Northern*, looked to the legal effect of such an estate on a subsequent patentee. The conflict involved title to the mineral estate underlying an 1875 Act right-of-way, where patent had issued containing no reservation of the minerals in the United States. Amerada Hess Corporation, the assignee of an oil and gas lease issued by the successor-in-interest of the original patentee, had filed a protest against the issuance of an oil and gas lease by the United States pursuant to the Right-of-Way Leasing Act of 1930. We found that in such a situation title to the servient mineral estate passed with the grant of the patent. The United States no longer had any mineral interest under the right-of-way, and, therefore, the Secretary of the Interior had no authority under the Leasing Act to dispose of the oil and gas lying therein. *Id.* at 378.

Present departmental regulations reflect this easement theory, describing the nature of the 1875 Act as follows:

\* \* \* A railroad company to which a right-of-way is granted does not secure a full and complete title to the land on which the right-of-way is located. It obtains only the right to use the land for the purposes for which it is granted and for no other purpose, and may hold such possession, if it is necessary to that use, as long and only as long as that use con-

tinues. The Government conveys the fee simple title in the land over which the right-of-way is granted to the person to whom patent issues for the legal subdivision on which the right-of-way is located, and such patentee takes the fee subject only to the railroad company's right of use and possession. \* \* \*

#### 43 CFR 2842.1(a).

In the present conflict before the Department the question has been raised by Wyoming's patent application whether title vested in it, under its school land grant, to the lands within the two sections covered by the 1875 Act rights-of-way, sec. 16, T. 13 N., R. 67 W., 6th P.M., and sec. 16, T. 13 N., R. 68 W., 6th P.M. The answer to this depends on whether the school land grant of those sections vested in the State prior to or subsequent to the date the railroad's interest attached.

If the school land grant vested prior to the railroad's easement, then the rule of *Wilcox v. Jackson*, 38 U.S. (13 Pet.) 266 (1839), applies, and the lands were not subject to subsequent disposition by the United States, *Cf. Minneapolis, St. Paul & Ry. Co. v. Doughty*, 208 U.S. 251 (1908). However, present departmental regulations provide that:

\* \* \* Whenever any right-of-way shall pass over private land or possessory claims on lands of the United States, condemnation of the right-of-way across the same may be made in accordance with the provisions of sec. 3 of the act of Mar. 3, 1875 (18 Stat. 482; 43 U.S.C. § 936), or the right can be purchased as provided by sec. 2288 of the Revised Statutes, *as amended* by section 3 of the

act of Mar. 3, 1891 (26 Stat. 1097; 43 U.S.C. § 174).

43 CFR 2842.1(b); *see Missouri-Kansas-Texas R. Co. v. Ray*, 177 F.2d 454 (10th Cir. 1949), *cert. denied*, 338 U.S. 955 (1950).<sup>19</sup>

If the school land grant was subsequent, then it must be determined whether the lands within the way were subject to subsequent disposition.

In light of *Great Northern Ry. Co. v. United States*, *supra*, it is settled that the railroad received only an easement under the General Right-of-Way Act of 1875. This easement, however, must be contrasted with the interest created by the 1850-1871 period right-of-way grants. The latter interest, whether called a limited fee or an easement, severed the lands within the rights-of-way from the mass of public lands, so that no subsequent law or proclamation could operate on them. *Rice v. United States*, *supra*; *Wyoming v. Udall*, *supra*. As a result, a subsequent grant by the United States of the encumbered tract could not include its title to the servient estate, even though no exception is made of it in the patent issued. This, however, is not the case with an 1875 Act grant. Upon

<sup>19</sup> In *Missouri-Kansas-Texas R. Co. v. Ray*, 177 F.2d 454 (10th Cir. 1949), *cert. denied*, 338 U.S. 955 (1950), the Tenth Circuit, relying on *Great Northern*, found that where a railroad acquired its 1875 Act right-of-way across school lands through condemnation proceedings, it acquired no greater interest in that way than an easement, notwithstanding the fact that the railroad had paid compensation for a fee.

the filing of the map of location, the railroad received its easement for railroad purposes, with the servient estate remaining in the United States. *Chicago & North Western Ry. Co. v. Continental Oil Co.*, *supra*. The railroad's easement in the right-of-way, however does not sever the lands from the public domain; therefore, title to the servient estate can pass in a subsequent grant by the United States of the traversed tract. *Wyoming v. Udall*, 379 F.2d at 639-40; *Amerada Hess Corp.*, *supra* at 372-79, 83 I.D. at 200; *Union Pacific R.R. Co.*, 72 I.D. 76, 80 (1965); *United States v. Dawson*, 58 I.D. 670, 677 (1944); *Grand Canyon Ry. Co. v. Cameron*, 35 L.D. 495 (1907); 43 CFR 2842.1 (a); see *Chicago & North Western Ry. Co. v. Continental Oil Co.*, *supra*; <sup>20</sup> cf. *Beecher v. Wetherby*, 95 U.S. 517 (1877).

Since the lands within an 1875 Act right-of-way were subject to subsequent disposition by the United States, the question arises whether such a subsequent disposition could occur pursuant to Wyoming's school land grant.

In *Wyoming v. Udall*, *supra*, the Circuit Court addressed the nature of an 1850-1871 period right-of-way grant, and its effect on the subsequent school land grant to Wyoming. The railroad's interest was labeled an easement in perpetuity, but was distinguished from a sur-

face easement because coal and iron rights were included in the right-of-way grant. It was this additional grant that the court found caused the right-of-way to fall within the "otherwise disposed of" language of the school land grant.

There is no such additional grant within the General Right-of-Way Statute of 1875, nor is there any other grant therein which is analogous. The 1875 Act granted only a surface easement to the railroad, and this, by itself, is not a disposition which would exclude the right-of-way from the grant of the school sections made in Wyoming's Enabling Act. See *Wyoming v. Udall*, 379 F. 2d at 640; *Amerada Hess Corp.*, *supra*; cf. *Beecher v. Wetherby*, *supra*.

Wyoming's title to the two sections in issue vested as of July 10, 1890, as the townships involved were surveyed prior to the date of statehood. However, it is not clear from the record on appeal when the the Union Pacific Railroad's interest attached in the 1875 Act rights-of-way traversing those sections.<sup>21</sup> Nevertheless, patents may issue including the lands within those two rights-of-way.

<sup>21</sup> The plats and historical indices regarding the two sections reveal that the Union Pacific's 1875 Act right-of-way traversing sec. 16, T. 13 N., R. 68 W., 6th P.M., was approved by the Secretary of the Interior on Oct. 19, 1903 (proof of construction made Sept. 18, 1926), and the other 1875 Act right-of-way traversing sec. 16, T. 13 N., R. 67 W., 6th P.M., was approved on July 11, 1908 (no proof of construction noted). However, the record does not reveal when the profile maps were filed in the local land office.

<sup>20</sup> In *Chicago & North Western Ry. Co. v. Continental Oil Co.*, 253 F.2d 468 (10th Cir. 1958), Continental would have had no standing to bring the suit as assignee of non-federal oil and gas leases if its lessors did not hold the title to the servient estate.

The Act of June 21, 1934, 43 U.S.C. § 871a (1970), provides that patents shall issue *upon application by the state*, where *title has vested or may thereafter vest* in the grantee state. If the school land grant vested prior to the railroad's interest, the state received full title to the sections. If the rights-of-way were condemned after title vested in the state or were granted prior to the school land grant's vesting, the state has title to the servient estate underlying the railroad's easement. See *Rice v. United States*, *supra*; *Wyoming v. Udall*, *supra*; *Missouri-Kansas-Texas R. Co. v. Ray*, 177 F.2d 454 (10th Cir. 1949), *cert. denied*, 338 U.S. 955 (1950). Therefore, since *title has vested*, patents should issue including the rights-of-way area.<sup>22</sup> Note, however, patent for title held in the servient estate should show "the extent to which the lands are subject to prior conditions, limitations, easements, or rights, if any." (*Italics added.*) 43 U.S.C. § 871a

<sup>22</sup> Where a state is vested with the title in the servient estate, title to the railroad's easement will thereafter vest in the state if and when the railroad ceases to use the rights-of-way for railroad purposes. The easement automatically terminates and attaches the fee in the state, without the necessity of a further grant. *Wyoming v. Udall*, 379 F.2d 634, 639 (10th Cir.), *cert. denied*, 389 U.S. 985 (1967); Annot., 136 A.L.R. 296, 297 (1942); cf. *Beecher v. Wetherby*, *supra*, n. 16. After the decision in *Great Northern Ry. Co. v. United States*, *supra*, n. 17, the Abandoned Railroad Right-of-Way Act of Mar. 8, 1922, 43 U.S.C. § 912 (1970), applied only to pre-1871 right-of-way grants. *Wyoming v. Udall*, *supra*. But see *Allard Cattle Co. v. Colorado & Southern Ry. Co.*, 530 P.2d 503 (Colo. 1974).

(1970); see *United States v. Dawson*, 58 I.D. 670 (1944).<sup>23</sup>

## INDEMNITY FOR SCHOOL LANDS LOST IN PLACE

Wyoming filed an indemnity selection application pursuant to 43 U.S.C. §§ 851, 852 (1970), seeking lieu selection as indemnity for acreage included within the limits of the Union Pacific's 1862 grant right-of-way. That application was found defective by the Bureau for the following reasons: (1) the base offered was improper because the State took title to the school secs. in place subject to the right-of-way granted by the Act of July 1, 1862, citing State of Wyoming, 58 I.D. 128 (1942); and (2) there was no provision in law made for indemnifying states for school sections traversed by railroads, granted either under special grants from Con-

<sup>23</sup> Volume V of the BLM Manual, Part 5, Final Certificates & Patents, § 5.1, does not reflect this requirement of notation of an 1875 Act right-of-way (easement) under 43 U.S.C. § 871a (1970), either in discussion of Reservation of Rights-of-Way or in Illustration 3. However, should a patent issue without reference to an established railroad right-of-way, that will neither enlarge the interest of the patentee nor diminish that of the railroad. *Stalker v. Oregon Short Line*, 225 U.S. 142, 154 (1912); *George W. Zarak*, 4 IBLA 82 (1971), *aff'd sub nom. Rice v. United States*, 479 F.2d 58 (8th Cir.), *cert. denied*, 414 U.S. 858 (1973). In Congressional legislation a patent has a double operation. It is a deed of the United States which operates like a quitclaim, conveying such interest as the United States possesses in the land. Where it issues upon the confirmation of a claim of previous existing title, it is documentary evidence of the existence of that title as justifies its recognition. *Wilson Cypress Co. v. Del Pozo y Marcos*, 236 U.S. 635, 648 (1915); *Beard v. Federy*, 70 U.S. (3 Wall.) 478, 491 (1865).

gress, like the 1862 grant, or under the General Right-of-Way Statute of 1875, citing *State of North Dakota*, 13 L.D. 454 (1891).

It is settled that Wyoming received no title or interest to the lands within this 1862 Act right-of-way granted the Union Pacific, and that those lands were "otherwise disposed of" within the meaning of its Statehood Act. *Wyoming v. Udall*, *supra*. The only question remaining is whether *State of North Dakota*, *supra*, correctly reflects the law on school indemnity for sections traversed by such a right-of-way.

General provisions governing the selection of school indemnity lands for loss of school land sections in place date back to the Act of May 20, 1826, 4 Stat. 179. That Act reserved lands for the use of schools in all townships, and fractional townships, for which no land had been previously appropriated in the school land grant states. By Act of Feb. 26, 1859, 11 Stat. 385, incorporated into Revised Statutes §§ 2275 and 2276, "other lands of like quantity" were appropriated to compensate for deficiencies caused either by preemption claims of settlers, or where the sections were fractional in quantity or were wanting because the township was fractional. However, a variety of conditions arose in the administration of the school land grants to the various states whereby the states or territories suffered losses without adequate indemnity provision. Sen. Rep. No. 502, 51st Cong., 1st Sess. 1 (1890); *State of Florida*, 30 L.D. 187, 188 (1900). Special laws were

enacted curing some defects respecting particular states or territories, but, as the school land grant was "intended to have equal operation and equal benefit in all the public land States and Territories," Revised Statutes §§ 2275 and 2276 were amended by Act of Feb. 28, 1891, 26 Stat. 796, providing a uniform rule for the selection of indemnity school lands. Sen. Rep. No. 502, *supra*; accord, *United States v. Wyoming*, 331 U.S. at 452; *Fannie Lipscomb*, 44 L.D. 414 (1915); *State of Florida*, *supra*; *State of Wyoming*, 27 L.D. 35, 38 (1898); *State of California*, 23 L.D. 423, 426 (1896). Equal acreage was appropriated and granted thereby for lands lost prior to survey by settlement, and, in addition, for lands lost where the sections were mineral lands, were included in any Indian, military or other reservation, or were *otherwise disposed of*. *State of Oregon*, 18 L.D. 343, 344-45 (1894). The 1891 Act has subsequently been amended,<sup>24</sup> 43 U.S.C. §§ 851, 852 (1970), and presently provides:

Where settlements with a view to preemption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on secs. sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections or either of them have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected, in accordance with the provisions of sec. 852 of this title, by said State, in lieu of such as may be thus taken by preemption

<sup>24</sup> Act of Aug. 27, 1958, 72 Stat. 928; Act of June 24, 1966, 80 Stat. 220.

or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted and may be selected, in accordance with the provisions of sec. 852 of this title, by said State where secs. sixteen or thirty-six are, before title could pass to the State, included within any Indian, military, or other reservation, *or are, before title could pass to the State, otherwise disposed of by the United States: Provided*, That the selection of any lands under this sec. in lieu of sections granted or reserved to a State shall be a waiver by the State of its right to the granted or reserved sections. And other lands of equal acreage are also appropriated and granted, and may be selected, in accordance with the provisions of sec. 852 of this title, by said State to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State shall be entitled to select indemnity lands to the extent of section for section in lieu of sections therein which have been or shall be granted, reserved, or pledged; but such selections may not be made within the boundaries of said reservation: *Provided, however*, That nothing in this sec. contained shall prevent any State from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the secs. sixteen and thirty-six in place therein.

43 U.S.C. § 851. (Italics added.)

Wyoming, pursuant to § 4 of its Statehood Act, 26 Stat. 222, which was enacted only 7 months before

the Act of Feb. 28, 1891, received school land grant secs. 16 and 36 in every township, unless those sections or any portion thereof had been "sold or otherwise disposed of by or under the authority of any act of Congress." Where such loss occurred, the State was entitled to select equivalent lands.

The Act of Feb. 28, 1891, and Wyoming's Statehood Act are *in pari materia*, and should be construed together. *State of California*, 31 L.D. 335, 340 (1902). Congress, by such legislation, devoted a fixed portion of the public lands to school purposes without warranting that the designated sections would exist in every township, or that if they did exist, that the State should in all events receive title thereto. *United States v. Morrison*, 240 U.S. at 201-02. In this manner, Congress assured the State the equivalent of the school grant secs. when and if those had been "sold or otherwise disposed of." *Id.* at 202. "The intent of Congress has always been to give every school section or its equivalent area." Sen. Rep. No. 502, *supra*; accord, *Johanson v. Washington*, 190 U.S. 179, 184-85 (1903).

Prior to the General Indemnity Act of Feb. 28, 1891, the Department was faced with the issue of the nature and effect of school land grants and their exclusion of lands generally grouped as "otherwise disposed of." Justice Lamar, while Secretary of the Interior, made the following analysis:

That where the fee is in the United States at the date of survey and the land is so encumbered that full and complete

title and right of possession can not then vest in the State, the State may, if it so desires, elect to take equivalent lands in fulfillment of the compact, or it may wait until the title and right of possession unite in the government, and then satisfy its grant by taking the lands specifically granted.

*State of Colorado*, 6 L.D. 412, 418 (1887); see *Minnesota v. Hitchcock*, 185 U.S. 373, 392-93 (1902); *United States v. Thomas*, 151 U.S. 577, 583 (1894); *Gregg v. Colorado*, 15 L.D. 151, 152 (1892); *Henry Sherry*, 12 L.D. 176, 180 (1890). The particular interests which conflicted with the school land grant in *State of Colorado* and the other cases cited were either Indian, military or other Government reservations. The Act of Feb. 28, 1891, provided specifically for those instances and others which had arisen in the administration of the school land grants. However, the catch-all language of "otherwise disposed of" remained a specific part of the school land grants.

From the beginning, governmental policy has been liberal in the appropriation of lands for school purposes. *Johanson v. Washington*, *supra*; *Minnesota v. Hitchcock*, *supra*; *Cooper v. Roberts*, 59 U.S. (18 How.) 173 (1855). In response to that policy the Supreme Court has regarded as justified any fair construction of such legislation as would secure to a state its full quota of lands for aid in the development of its public school system. *Minnesota v. Hitchcock*, *supra* at 401.

In the present case Wyoming's title to the area within the 1862 Act right-of-way will never vest

pursuant to its school land grant alone; the railroad's title reverts to the United States when the way is no longer used for railroad purposes. *State of Wyoming*, 58 I.D. at 134; cf. *State of Utah (On Petition)*, 47 L.D. 359 (1920); *Andrew J. Billan*, 36 L.D. 334 (1906). Only a possibility of vesting may arise pursuant to the Act of Mar. 8, 1922, 43 U.S.C. § 912 (1970), which grants that area to the owner or purported owner of the "whole of the legal subdivision" traversed by the right-of-way, upon abandonment or forfeiture "declared or decreed by a court of competent jurisdiction or by Act of Congress," provided that "the transfer of such lands shall be subject to and contain reservations in favor of the United States of all oil, gas and other minerals in the land so transferred and conveyed \* \* \*." However, if the right-of-way is never abandoned or forfeited, or if it is located within a municipality, the State could never acquire title.

The Act of 1922, therefore, if remedial, and if applicable,<sup>25</sup> is as a bandaid where major surgery is required. Not only is it highly conditional as to the vesting of the surface covered by the right-of-way, but it prevents the State from ever enjoying what in many cases is the most valuable component of western land, the oil, gas and other minerals thereunder. See 43 U.S.C. § 870 (1970).

Because of the vast scope of the railroad grants during the 1850-

<sup>25</sup> See note 15, *supra*.

1871 period, the school land grant would be materially diminished unless indemnity for those portions lost is allowed. Both Wyoming's Statehood Act and 43 U.S.C. § 851 (1970) provide for such a situation by granting other lands equivalent to those lost. Neither Act limits how such section might be lost by their general usage of "otherwise disposed of." Therefore, it must be presumed that Congress intended the State to have its full grant of lands for school purposes, without specific reference to the causes which brought about the loss. *State of Florida*, 30 L.D. 187 (1900).

*State of North Dakota, supra*, is in conflict with the law as interpreted by the courts and this Department, and results in a situation contrary to the legislative purpose of Congress. See *Wyoming v. Udall*, 379 F. 2d at 640. Therefore, its finding affecting school land indemnity for 1850-1871 period right-of-way grants should be overruled, and, Wyoming's indemnity application, proper in all other respects, should be accepted and the appropriate departmental steps taken in response.<sup>26</sup>

NEWTON FRISHBERG,  
Chief Administrative Judge.

<sup>26</sup> 43 CFR 2621.2(d) (3), regulating school indemnity selection applications, states in part that:

"A portion of a smallest actual or probable legal subdivision may be assigned as base but such assignment is an election to take indemnity for the entire subdivision and is a waiver of the State's rights to such subdivision, except that any remaining balance may be used as base for future selections."

This provision does not require the state to waive its already vested title to the rest

## RUSHTON MINING COMPANY

### 6 IBMA 329

Decided September 29, 1976

Cross appeals by the Mining Enforcement and Safety Administration and Rushton Mining Company from an initial decision by Administrative Law Judge Edmund M. Sweeney (Docket No. 75-400-P), dated Oct. 15, 1975, vacating a proposed assessment for one violation and assessing civil penalties in the total amount of \$700 for three violations of mandatory safety standards in a civil penalty proceeding brought pursuant to sec. 109 of the Federal Coal Mine Health and Safety Act of 1969.

Reversed in part and affirmed in part.

#### 1. Federal Coal Mine Health and Safety Act of 1969: Penalties: Existence of Violation: Evidence

A fact may be inferred from circumstantial evidence, and such fact may be the basis of further inference leading to the ultimate or sought for fact.

#### 2. Federal Coal Mine Health and Safety Act of 1969; Penalties: Existence of Violation: Evidence

Where an inspector describes a condition alleging that a violation occurred during

of the lands within the smallest legal subdivision traversed by the right-of-way. Its application is limited to those subdivisions not vested in the state which might vest at a later date. Cf. *Work v. Central Pac. Ry. Co.*, 12 F.2d 834, 836 (D.C. Cir. 1926). The right to acquire title is subject to reasonable regulation by the Department, and, as lieu selections are disposals of the public lands, they are subject to reasonable regulation. *Id.*

the working shift immediately preceding the shift in which the inspection is made, a prima facie case that the violation occurred during the preceding shift may be made out by means of an inference drawn from facts established by direct evidence, provided that such inference is more probable than any other inference which can be drawn from such facts.

**APPEARANCES:** Ira P. Smades, Esq., for appellant—cross-appellee, Rushton Mining Company; Thomas A. Mascolino, Esq., Assistant Solicitor, and Michael V. Durkin, Esq., Trial Attorney, for appellee—cross-appellant, Mining Enforcement and Safety Administration.

*OPINION BY CHIEF ADMINISTRATIVE JUDGE DOANE*

*INTERIOR BOARD OF MINE OPERATIONS APPEALS*

*Background*

The instant proceeding involves an appeal by Rushton Mining Company (Rushton) from that part of the decision by Administrative Law Judge Edmund M. Sweeney (Judge) assessing penalties for three alleged violations and an appeal by the Mining Enforcement and Safety Administration (MESA) from that part of the same decision vacating the penalty proposed with respect to an alleged violation contained in an order of withdrawal. The alleged violations resulted from an inspection of the Rushton Mine in Centre County, Pennsylvania, by MESA Inspector Donald J. Klemick. The

violations involved in the appeal by Rushton and the assessments for each are as follows:

Notice No.	Violation charged	Date	Amount
1 DJK	30 CFR 75.327-1.	10-02-74	\$300
1 DJK	30 CFR 75.301.	10-07-74	300
1 DJK	30 CFR 75.1713.	10-21-74	100

MESA is appealing from the Judge's action in vacating any proposed assessment for a violation of 30 CFR 75.301 contained in Order of Withdrawal No. 1 DJK, 10-21-74, at the aforesaid mine.

On Oct. 15, 1975, Judge Sweeney issued his decision after a hearing on the merits held in Arlington, Virginia, on June 24, 1975.

Both Rushton and MESA filed subsequent Notices of Appeal with the Board. Rushton filed its Notice on Oct. 28, 1975, and MESA, on Nov. 3, 1975.

Rushton filed its brief of appellant on Nov. 17, 1975. MESA responded on Dec. 5, 1975, with its appellee's brief.

MESA filed its appellant's brief on Nov. 24, 1975, and Rushton's brief of appellee was received by the Board on Dec. 22, 1975.

*Issues Presented on Appeal*

A. Whether the Judge erred in finding no violation and vacating any proposed assessment for the alleged violation of 30 CFR 75.301 contained in Order of Withdrawal No. 1 DJK, 10-21-74.

B. Whether the penalties assessed by the Judge for each of the three

challenged Notices of Violation were excessive and whether Notice of Violation No. 1 DJK, 10-7-74, was properly sustained.

### *Discussion*

#### **A.**

Order of Withdrawal No. 1 DJK, 10-21-74, issued pursuant to sec. 104(c) (2) of the Act, cites a violation of 30 CFR 75.301,<sup>1</sup> the language of which is identical to that of sec. 303(b) of the Act. The relevant part of that mandatory standard requires that the " \* \* \* minimum quantity of air in any coal

<sup>1</sup>The Order reads in part as follows:

"Evidence, such as openings from 5 to 18 inches above crossbars from the top of the installed brattice cloth to the roof, from 22 to 24 inches from the bottom of the brattice cloth to the mine floor, and 24-inch long cribbing blocks installed behind the brattice cloth from the mine floor to the roof and from the coal rib to the brattice cloth that was attached to the cribbing blocks at these locations, indicated that the required 3,000 c.f.m. was not reaching the working face in the No. 4 entry of the 1st north No. 3 miner section on the midnight shift. This was the only entry being driven in this section. Before any corrections were made an air reading was attempted with an anemometer, a reading could not be obtained and a smoke cloud only revealed perceptible air movement at the inby end of the brattice cloth which was installed about 5 feet from the face and which was extended for about 130 feet into the No. 4 entry from the last open crosscut to the No. 3 entry. There was no evidence to indicate that the existing openings were closed previously and a velocity of air could not pass through the installed cribbing blocks in order to support 3,000 c.f.m. in the face area. Work was being performed by four miners and the section foreman in an attempt to obtain the required 3,000 c.f.m. The section foreman, Eugene Livergood stated that he had never taken an air reading at the inby end of the line brattice in the No. 4 entry of the 1st north mains No. 3 miner section since the adverse conditions have arisen."

mine reaching each working face shall be 3,000 cubic feet a minute." 30 U.S.C. § 863(b) (1970).

In his Decision, the Judge concluded:

\* \* \* that MESA has the burden of proving by the preponderance of the evidence any violation it charges; that since Rushton offered no contradictory testimony relating to conditions set out in Order of Withdrawal No. 1 DJK of 10/21/74, MESA needed here only to establish a prima facie case of violation in order to preponderate; that the testimony of Inspector Klemick, MESA's sole witness on the subject, is not credible because it was based upon assumptions, correlations, and suppositions rather than upon personal observation at the time a violation is alleged to have occurred; that there is no credible evidence that the conditions set out in said Order existed during said midnight shift; that MESA has failed to establish a prima facie case of violation as to said order; \* \* \* [Dec. 13].

MESA attempted to apply the subject cited violation to the midnight shift preceding the shift in which the inspection was made and its argument on appeal pursues this position.

Rushton in its reply brief asserts that the Judge did not "ignore" the evidence introduced by the inspector, but merely decided that the evidence suggested only a "possibility" of a violation. Rushton further contends that the existence of a possibility is inadequate to sustain the burden of proving the violation.

The following observations by Inspector Klemick were unchallenged by Rushton at the hearing: coal was mined in the No. 4 Entry

during the midnight shift (Tr. 89); the line brattice going into the No. 4 Entry was improperly installed with the result that 3,000 cubic feet of air was not reaching the working face (Tr. 82);<sup>2</sup> this lack of ventilation could not have escaped the operator's knowledge since it existed in the only entry that was being driven in the subject mine at that juncture (Tr. 101). It was also undisputed that anemometer and smoke cloud tests, taken at the subject working face and completed at 9 a.m. on Oct. 21, 1974, disclosed a violation of regulation 30 CFR 75.301 (Tr. 83, 86, 105). At 12:55 p.m. he concluded that abatement was improbable due to a bad roof condition,<sup>3</sup> and issued the sec. 104 (c) (2) Order of Withdrawal based upon a violation of sec. 75.301.

[1] The sole issue on appeal concerns whether the inference that a condition violative of sec. 75.301 existed during the midnight shift is more probable than any other inference which could be drawn from the facts proved. Having considered the record evidence, the Board finds little merit in the contention that some other inference could be drawn

<sup>2</sup> In response to why the condition could not be corrected, the inspector stated:

"\* \* \* they run brattice cloth straight across these cavities and the air naturally would divert over the top and because of the bad roof conditions they set a cribbing behind the brattice cloth, and I have a sketch of the cribbing which would only allow a minimum amount of air to pass through the cribbing. In other words, the line brattice was there installed because the law said, but there was no way they could deliver 3,000 feet to that face. \* \* \*" (Tr. 89-90).

<sup>3</sup> As evidence of this condition, the inspector described a cavity in the No. 4 Entry located at crib blocks about 75 feet in by the last open crosscut. The length of the cavity was 12 feet and its depth approximately 4½ feet from the original roof (Tr. 103-104).

from the established facts. See *Sewell Coal Company*, 2 IBMA 80, 83, 80 I.D. 251, 1971-1973 OSHD par. 15,583 (1973), citing *New York Life Ins. Co. v. McNeely*, 79 P.2d 948 (1938) at 954.

At the hearing, the tenor of questions posed by counsel for Rushton assumed that there was inadequate ventilation.<sup>4</sup> Rushton presented no evidence with respect to how the subject condition was created, i.e., by accident, experimental testing, or otherwise.<sup>5</sup> The evidence shows almost a 4-hour interval between completion of the tests at 9 a.m. and issuance of the withdrawal order. Four hours of working to rectify the condition without accomplishing abatement would justify the inference that prior to 9 a.m., during the midnight shift, the alleged violative condition existed.<sup>6</sup> The opinion of the inspector was that under the conditions then observed by him,

\* "Q. Did you enter the mine with the men who were attempting to acquire adequate ventilation or did they enter before you did?"

\* "Q. All right, fine. In other words, they were making some effort in order to secure adequate ventilation? ! ! ! [Tr. 94.]

\* "Q. Mr. Klemick, were the men involved in this making, in your opinion, making a diligent effort to bring the air up on this? \* \* \* [Tr. 100.]

\* "The thrust of Rushton's questioning at the hearing evidenced a two-pronged objective aiming to prove (1) that coal was not being mined at the time the inspector made the anemometer and smoke cloud tests, and (2) that the inspector did not have actual first-hand knowledge that the condition existed during the midnight shift.

\* "When asked why he did not issue the Order at 9 a.m. but delayed until 12:55 p.m., the inspector responded:

\* " \* \* due to the condition of the area and the condition of that entry, I was trying to give the operator as much time to deliver 3,000 feet up there to prove to me that the midnight shift definitely had 3,000. \* \* \*" [Tr. 87.]

the operator did not and could not have delivered and maintained 3,000 cubic feet of air at the working face on the previous shift (Tr. 107).

(2) Based upon the evidentiary proposition laid down in *Sewell Coal Company, supra*,<sup>7</sup> as applied to the foregoing circumstances, we find that the inference that 3,000 cubic feet of air a minute was not reaching the subject working face during the midnight shift is more probable than any other inference which could be drawn. We further find that MESA did carry its burden of proof by a preponderance of the evidence and that Rushton offered no rebuttal. Accordingly, we must reverse the Judge's conclusion that MESA failed to establish a prima facie case of a violation of 30 CFR 75.301, on the basis of the conditions cited in Withdrawal Order No. 1 DJK, 10-21-74.

In lieu of a remand, the Board may make the required findings of fact to coincide with the record evidence regarding any of the six criteria of section 109(a). *Buffalo Mining Company*, 2 IBMA 226, 230, 80 I.D. 630, 1973-1974 OSHD par. 16,618 (1973). Accordingly; the Board finds that: 1) the history of Rushton's previous violations is insubstantial; 2) the mine is a fairly large mine in that it employs 181 persons with a production of 2,800 tons daily and 475,000 tons annually; 3) its ability to stay in business will not be affected by the civil penalties assessed; and 4) the subject section was permanently closed following the issuance of the order

and the violation never abated, therefore, good faith in abating the condition is not a consideration. We also find that Rushton was negligent in not exercising reasonable care to test for sufficient ventilation at the inby end of the line brattice in the No. 4 Entry. Moreover, the violation was grave in that the velocity of the air current was inadequate to dilute, render harmless, or carry away any harmful gases, dust, or explosive fumes at the working face during advancement of the No. 3 Miner Section beyond the crib blocks. Based upon the foregoing findings, we conclude that an appropriate penalty assessment for such violation is \$1,000.

#### B.

With respect to Notice of Violation No. 1 DJK, 10-2-74,<sup>8</sup> Rushton contends that the penalty assessed therefor should be reduced, arguing that the Judge erred in disallowing conflicting Federal and State inspections as a mitigating factor and that Rushton, having given notice of the inconsistency to a MESA representative, had done all that was necessary under the circumstances. MESA correctly re-

<sup>8</sup> The Notice of Violation No. 1 DJK 10-2-74, was issued pursuant to sec. 104(b) of the Act and charges a violation of 30 CFR 75.327-1 which reads as follows:

"Unless a higher velocity is approved by the Coal Mine Safety District Manager, the velocity of the air current in the trolley haulage entries shall be limited to not more than 250 feet a minute. A higher air velocity may be required to limit the methane content in such haulage entries or elsewhere in the mines to less than 1.0 per centum and provide an adequate supply of oxygen."

The fact of violation is not disputed by Rushton.

<sup>7</sup> See IBMA 80, 85, n. 7.

fers to sec. 506(a) of the Act (30 U.S.C. § 955(a) (1970)) as dispositive of the issue of conflict between Federal and State inspections. The language of that section reads as follows:

No State law in effect on the date of enactment of this Act or which may become effective thereafter shall be superseded by any provision of this Act or order issued or any mandatory health or safety standard, except insofar as such State law is in conflict with this Act or with any order issued or any mandatory health or safety standard.

That section leaves no doubt as to which statutory law takes precedence for compliance purposes and accordingly, we determine that Rushton's mitigation argument is without merit.

With respect to Notice to Violation No. 1 DJK, 10-7-74,<sup>9</sup> Rushton admits that the air quantity in the last open crosscut failed to meet the 9,000 cubic feet minimum, but raises an affirmative defense in attributing the reduction to an agreement between Rushton and MESA concerning certain experiments conducted in the area of the subject crosscut. At the hearing Rushton

did not offer any evidence of this agreement and therefore failed to preponderate.

With respect to Notice of Violation No. 1 DJK, 10-21-74,<sup>10</sup> Rushton contends that the Judge's assessment of \$100 for this violation was excessive in light of his designating the violation "nonserious." A finding that the violation was "nonserious" is not conclusive in determining the amount of the penalty to be assessed, since the gravity of the violation is only one of six criteria considered by the Judge in determining the penalty assessment.

Having considered the Judge's decision in light of the record evidence, we find that Rushton's contentions are without merit and see no reason to disturb the Judge's findings of fact and conclusions of law. We find substantial evidence to support the decision and order of the Judge with respect to the three aforecited violations and the amounts assessed therefor appear to be reasonable in light of the Judge's consideration of the six statutory criteria of section 109 of the Act. Accordingly, we must affirm that

<sup>9</sup> The MESA inspector cited a violation of 30 CFR 75.301, the disputed part of which reads as follows:

"\* \* \* The minimum quantity of air reaching the last open crosscut in any pair or set of developing entries and the last open crosscut in any pair or set of rooms shall be 9,000 cubic feet a minute, \* \* \*"  
30 U.S.C. § 863(b) (1970). The inspector described the violative condition thus:

"The quantity of air that was reaching the last open crosscut between the No. 2 and No. 3 rooms of the 'B' butt of 1st left—2nd south mains section was too low to measure with an anemometer and when a smoke cloud was used in an attempt to measure the quantity of air, only perceptible movement was detected. The attempted measurements were witnessed by Clarence Burke, Safety Director."

<sup>10</sup> The language of 30 CFR 75.1713-3 reads as follows:

"On or before Dec. 30, 1970, each operator of an underground coal mine shall conduct first-aid training courses for selected supervisory employees at the mine, and report in writing to the District Manager the names and job titles of all supervisory employees so trained. Thereafter, each operator shall, within 60 days after the selection of a new supervisory employee to be trained, report in writing to the District Manager the name and job title of such employee and the date on which such employee satisfactorily completed a first-aid training course."

Notice of Violation No. 1 DJK, 10-21-74, reads as follows:

"The operator did not report in writing to the District Manager the names and job titles of all supervisory employees trained in first-aid."

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part of the Judge's decision as to the three aforecited violations.

### ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that that part of the Judge's decision and order vacating the proposed assessment for the alleged violation described in Order of Withdrawal No. 1 DJK, 10-21-74, in the above-captioned case IS REVERSED; that said violation IS REINSTATED; that a penalty of \$1,000 for said violation IS ASSESSED therefor; that that part of the Judge's decision and order assessing civil penalties for Notices of Violation No. 1 DJK, 10-2-74, No. 1 DJK, 10-7-74, and No. 1 DJK, 10-21-74, IS AFFIRMED; and that Rushton Mining Company pay penalties in the total amount of \$1,700 on or before 30 days from the date of this decision.

DAVID DOANE,

*Chief Administrative Judge.*

I CONCUR:

LOUIS E. STRIEGEL,  
*Member of the Board.*

CONCURRING OPINION BY  
JUDGE SCHELLENBERG:

I concur in the result except with respect to Order of Withdrawal No. 1 DJK 10-21-74 (Discussion A. *supra*).

I find it unnecessary to rely upon inference and circumstantial evi-

dence since the record evidence amply establishes a violation of 30 CFR 75.301 at the time and in the place of the inspection. As stated on page 335, *supra*. "It was also undisputed that anemometer and smoke cloud tests, taken *at the subject working face* and completed at 9 a.m. on October 21, 1974, *disclosed a violation of regulation 30 CFR 75.301* (Tr. 83, 86, 105)." (Italics added.) In the case of a violation of a continuing nature I see no need to relate such violation to a previous shift when it in fact existed at the time of the inspection. Furthermore, I see no prejudice to the operator in the fact that the citation referred to a previous shift. The length of time that such violation existed before detection goes to the gravity and negligence factors in the assessment of civil penalty and not to the fact of violation.

HOWARD J. SCHELLENBERG, JR.,  
*Administrative Judge.*

ONEIDA MINING COMPANY  
NORTH AMERICAN COAL  
CORPORATION

THE HELEN MINING COMPANY  
THE FLORENCE MINING COMPANY

6 IBMA 343

Decided September 29, 1976.

Appeal by Mining Enforcement and Safety Administration from a decision by Administrative Law Judge

Michael A. Lasher, Jr., dated Mar. 26, 1976, in Docket Nos. M 74-67, M 74-68, M 74-107, and M 74-108 which dismissed four Petitions for Modification of the application of 30 CFR 75.1405 pursuant to sec. 301(c) of the Federal Coal Mine Health and Safety Act of 1969.

Vacated and remanded.

**1. Federal Coal Mine Health and Safety Act of 1969: Modification of Application of Mandatory Safety Standards: Generally**

A Petition for Modification of the application of 30 CFR 75.1405 alleging that the mandatory standard does not apply to rubber-rail equipment which operates both on and off track fails to state a claim for which relief can be granted under sec. 301(c) of the Act. 30 U.S.C. § 861(c) (1970).

**2. Federal Coal Mine Health and Safety Act of 1969: Modification of Application of Mandatory Safety Standards: Generally**

An Administrative Law Judge lacks discretion under sec. 301(c) to grant an operator purely declaratory relief sought in a Petition for Modification of the application of a mandatory safety standard. 30 U.S.C. § 861(c) (1970).

**APPEARANCES:** Thomas A. Mascolino, Esq., Assistant Solicitor, and Michael V. Durkin, Esq., Trial Attorney, for appellant, Mining Enforcement and Safety Administration; Richard McMillan, Jr., Esq., for appellee, Oneida Mining Company, et al.; Henry McC. Ingram, Esq., for amicus curiae, Keystone Bituminous Coal Association.

**OPINION BY CHIEF ADMINISTRATIVE JUDGE DOANE**

**INTERIOR BOARD OF MINE OPERATIONS APPEALS**

*Factual and Procedural Background*

Oneida Mining Company, et al. (Oneida), initiated this proceeding by filing a Petition for Modification<sup>1</sup> of the application of 30 CFR 75.1405 which provides:

All haulage equipment acquired by an operator of a coal mine on or after Mar. 30, 1971, shall be equipped with automatic couplers which couple by impact and uncouple without the necessity of persons going between the ends of such equipment. \* \* \*

The equipment which is the subject of this Petition consists of rubber-rail vehicles used to transport supplies and equipment from the surface to the face. These vehicles operate both on-track and, by means of retractable rubber wheels off-track. As grounds for its Petition for Modification, Oneida stated that sec. 314(f) (30 CFR 75.1405) was inapplicable to its supply vehicles because such equipment was not haulage equipment for purposes of hauling coal nor was it track haulage equipment which was regularly coupled and uncoupled within the meaning of 30 CFR 75.1405-1. Further, Oneida contended that even if the automatic coupler requirements did apply, the coupling system described in the Petition was as safe

<sup>1</sup> For purposes of this decision use of the singular includes all of the petitioners.

as or safer than the mandatory standard and that the application of the mandatory standard would result in a diminution of safety to the miners. At the hearing held in this matter on Mar. 25, 1975, and in its post-hearing brief, the Mining Enforcement and Safety Administration (MESA) contended that an Administrative Law Judge (Judge) was not at liberty to determine the applicability of mandatory safety standards in a proceeding held pursuant to sec. 301(c) of the Act.

In his decision, the Judge dismissed the Petitions for Modification on the ground of mootness based upon his determination that 30 CFR 75.1405 did not apply to the subject equipment.

MESA filed a timely appeal and in its supporting brief stated, in a footnote, that it continued to challenge the Judge's jurisdiction to decide this question and cited the Board's decision in *Itmann Coal Company*, 6 IBMA 121, 83 I.D. 175, 1975-1976 OSHD par. 20,628 (1976).

In its reply brief, Oneida contends that in order for a Judge to determine whether the application of a mandatory safety standard should be modified, he must consider if there is an applicable mandatory safety standard, if this issue is raised.

In its brief filed as amicus curiae, Keystone Bituminous Coal Association (Keystone) distinguishes the

Board's decision in *Itmann, supra*, and states that "the existence of an otherwise applicable mandatory safety standard is a jurisdictional prerequisite to any consideration of whether that standard should be modified."

### *Issue Presented*

Whether a Petition for Modification which seeks relief from the application of 30 CFR 75.1405 on the ground that the mandatory standard does not apply to the equipment which is the subject of the Petition states a claim for which relief can be granted under sec. 301(c) of the Act.

### *Discussion*

Sec. 301(c) of the Act was intended by Congress to provide the operator or representative of the miners with relief if they show that an alternative method or system provided the same or greater degree of safety as that provided by a mandatory safety standard. In addition, these parties may be granted relief if they show that the application of such standard would result in a diminution of safety. In the instant case, Oneida presented the Judge with alternative arguments in its Petition for Modification. Its initial argument was that the mandatory safety standard in question did not apply to its haulage equipment, but if it were determined that it did apply, its alternative argument was that its proposed

method was as safe as or safer than the mandatory standard and that application of the standard would result in a diminution of safety. The Board is of the opinion that it is error for a Judge to dismiss a Petition for Modification on the ground that the mandatory safety standard involved does not apply to the subject equipment.

In our decision in *Itmann*, *supra*, the Board held that sec. 301(c) does not cover a claim for relief from MESA's interpretation of a mandatory safety standard which does not have the force and effect of law. We noted that "[t]o conclude otherwise would turn sec. 301(c) into a review proceeding involving abstract claims for declaratory relief \* \* \*." Further, we pointed out that the operator may challenge this interpretation in the course of seeking an administrative remedy from enforcement of such interpretation in an application for review proceeding. The Board is of the opinion that, contrary to the contentions of Keystone and Oneida, our decision in *Itmann* is dispositive of the instant case.

[1, 2] Whenever MESA issues a notice of violation of any mandatory safety standard, it is alleging that such standard is applicable to the mine involved. This allegation is, in essence, an interpretation of such standard as relates to its applicability. As a result, in the absence of a notice of violation, an operator must make its own determination as to applicability of a mandatory safety standard. If it

believes such standard to be applicable, but has an alternative method, it should file a Petition for Modification. If it believes such standard to be inapplicable, it should await receipt of a notice of violation of such standard in order to challenge the validity of the notice in an application for review or penalty proceeding. In either of the latter proceedings the applicability of the standard to the equipment involved must be considered part and parcel with the other issues concerning the fact of violation. In a Petition for Modification proceeding, it must be presumed that the subject standard applies to the mine or equipment in question; otherwise the petition is unnecessary. To permit an operator to question the applicability of a mandatory safety standard in a sec. 301(c) proceeding would be contrary to the above premise upon which sec. 301(c) is based and would result in Judges and the Board rendering declaratory judgments, a function which is not included in their delegation of authority. Accordingly, the Board is of the opinion that by alleging that 30 CFR 75.1405 does not apply to its supply vehicles, Oneida's Petition for Modification fails to state a claim for which relief can be granted in a sec. 301(c) proceeding. Inasmuch as his disposition of the instant case was not on the merits thereof, it will be necessary for the Board to remand the case to the Judge for his consideration on the merits.

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**ORDER**

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision of the Judge in the above-captioned case IS VACATED and the case IS REMANDED for consideration consistent with the views expressed herein.

DAVID DOANE,

*Chief Administrative Judge.*

WE CONCUR:

HOWARD J. SCHELLENBERG, JR.,  
*Administrative Judge.*

LOUIS E. STRIEGEL,  
*Member of the Board.*

**COWIN AND COMPANY, INC.**

6 IBMA 351

Decided *September 29, 1976*

Appeal by Cowin and Company, Inc., from a decision and order by Administrative Law Judge Malcolm P. Littlefield (Docket No. BARB 74-259), dated Apr. 3, 1975, dismissing an Application for Review of an order of withdrawal issued pursuant to sec. 104(a) of the Federal Coal Mine Health and Safety Act of 1969.

Reversed.

Federal Coal Mine Health and Safety Act of 1969: Secretarial Orders: Generally

An order signed by the Secretary which establishes enforcement policy is binding throughout the Department, and its validity is neither procedurally nor substantively subject to challenge at the administrative level.

**APPEARANCES:** W. S. Pritchard, Esq., for appellant, Cowin and Company, Inc.; Kahlman R. Fallon, Esq., Regional Solicitor, Thomas A. Mascolino, Esq., Assistant Solicitor, for appellee, Mining Enforcement and Safety Administration.

**OPINION BY DIRECTOR  
RICHARDS**

**OFFICE OF HEARINGS AND  
APPEALS**

*Background*

On Nov. 3, 1973, George W. Kessler, a duly authorized representative of the Mining Enforcement and Safety Administration (MESA), issued a sec. 104(a) order of withdrawal to the applicant Cowin and Company, Inc. (Cowin) pursuant to the Federal Coal Mine Health and Safety Act of 1969 (the Act). 30 U.S.C. § 814(a) (1970). It describes the following condition:

Violations of Sections 77.1703(c), 77.1905(b), 77.1906(c), 77.1907(b), 77.1908(b), and 77.1908-1 were in existence at "B" Shaft. The Ingersoll-Rand utility air hoist was being used to transport men and was not equipped with an accurate depth indicator; a qualified hoist man was not operating the hoist and a second person qualified to stop the hoist was not in attendance; no record was maintained to indicate that the hoist had been inspected prior to hoisting of men. The hoist rope was not

equipped with an adequate number of rope clamps and the bucket was not provided with two bridle chains, a wooden pole was being used for a bucket guide and a crescent wrench was used to operate the air valve.

On Jan. 22, 1975, a hearing was held before Administrative Law Judge Malcolm P. Littlefield (Judge) and on Apr. 3, 1975, he issued an order affirming the issuance of Withdrawal Order No. 1 GWK, dated Nov. 3, 1973, and dismissing Cowin's Application for Review. The United Mine Workers of America (UMWA) did not participate during this stage of the proceedings.

On Apr. 21, 1975, Cowin's Notice of Appeal was received by the Board, and on May 8, 1975, an appellant's brief was timely filed. On June 2, 1975, MESA filed a reply brief.

On May 6, 1976, the Board issued an Order Scheduling Oral Argument based upon a series of judicial and administrative decisions (discussed *infra*) issued at the time of, or subsequent to, the filing of the parties' briefs with the Board and bearing directly on the issue raised in the instant appeal. On May 26, 1976, at the conclusion of the oral argument, Chief Administrative Judge Doane requested the parties to submit briefs stating their contentions as to the status of the law in light of the recent judicial and administrative rulings. Cowin filed an "Appellant's Supplemental Brief" with the Board on June 11,

1976. MESA filed its "Statement of Position" on June 21, 1976.

On July 12, 1976, the UMWA filed a "Motion for Leave to Intervene or to File A Brief Amicus Curiae" together with a brief expounding its position. They argue that the Board should defer any decision pending the outcome of various appeals in the Courts.

The record evidence discloses the following undisputed facts: Cowin is a general contractor engaged in the construction business and in the instant case was hired by the U.S. Pipe and Foundry Company (U.S. Pipe) to construct three shafts at the latter's coal mine located at Johns, Alabama (Tr. 7). At the time of the issuance of the order, U.S. Pipe had not yet begun to extract or process coal from its No. 3 Mine which was still under construction by Cowin (Tr. 9). The record is silent with respect to whether any representative of U.S. Pipe was at the site to supervise Cowin's operations.

#### *Contentions on Appeal*

In its "Appellant's Brief," Cowin's major contention is that it is exempt from the Act. It cites legislative history as indicative of Congressional intent not to provide for the health and safety of employees of general contractors such as Cowin; it contends that it has never performed that function of a coal mine as set forth in sec. 802 of Title 30, *United States Code*, viz., the "work of extracting \* \* \*

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coal";<sup>1</sup> and further contends that the three-judge District Court decision in *Association of Bituminous Contractors, Inc. v. Brennan*, 372 F. Supp. 16 (D.C.D.C. 1974), holding that coal mine construction companies are not operators within the meaning of Title IV of the Act applies to the remaining Titles. In its "Supplemental Brief" Cowin argues that the Board's decision in *Republic Steel Corporation*<sup>2</sup> should

not be considered in resolving the issue on appeal based on the fact that *Republic Steel* concerns citations issued after May 24, 1975, the date on which Secretarial Order No. 2977<sup>3</sup> went into effect (Brief, p. 9).

MESA's reply brief argues that coal mine construction contractors are subject to the Act based on the following contentions: a reading of sec. 802 does embrace such contractors within its purview; the Court in *Brennan*, *supra*, confined the impact of its decision solely to Title IV; and the case history of the Board of Mine Operations Appeals is well-documented in finding these construction contractors subject to the provisions of the Act. In its

<sup>1</sup> The following language of sec. 802(h) is identical to that of sec. 3(h) which sets forth parameters of a "coal mine":

"(h) 'coal mine' means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities; \* \* \*"

Cowin also makes reference to sec. 803 of Title 30 (identical to sec. 4) captioned "Mines Subject to Act." It reads as follows:

"Sec. 4. Each coal mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act."

Juxtaposing secs. 3(h) and 4, Cowin argues that Congress did not intend to subject construction contractors to the provisions of the Act:

"The definitions of 'operator' and 'miner' are both dependent upon the definition of 'coal mine.' The applicability and scope of the Act, as set forth in Section 803, is [sic] determined and limited by the definition of 'coal mine.' The definition of 'coal mine,' as contained in the Act, and as evidenced by the legislative history of the Act, is not broad enough to encompass typical industrial construction projects, merely because they coincidentally happen to take place on coal mine properties." [Appellant's Brief, p. 10.]

<sup>2</sup> 5 IBMA 306, 82 I.D. 607, 1975-1976 OSHD par. 20,233 (1975).

<sup>3</sup> Secretarial Order No. 2977 issued Aug. 21, 1975, effective retroactively to May 24, 1975, reads as follows:

"Subject: Issuance of citations to operators pursuant to the Federal Coal Mine Health and Safety Act of 1969.

"Sec. 1 Purpose. (a) The purpose of this order is to direct Mining Enforcement and Safety Administration to continue to inspect construction work conducted on coal mine property, and to issue appropriate citations for violations of the Federal Coal Mine Health and Safety Act of 1969 and/or for hazardous conditions or practices committed and/or created by contractors on such property on and after May 24, 1975; to the operator of the coal mine on whose behalf the contractor is performing work.

"(b) This order is issued to comply with the declaratory judgment order in *Association of Bituminous Contractors, Inc. v. Rogers C. B. Morton, Secretary of the Interior*, Civil Action No. 1058-74, U.S. District Court for the District of Columbia, and to carry out the mandate of Congress announced in the Federal Coal Mine Health and Safety Act of 1969 to enforce the provisions of the Act in all coal mines subject to the Act.

"Sec. 2 Effective Date. This order shall be effective as of May 24, 1975. This order will remain in effect until rescinded by subsequent order of the Secretary."

"Statement of Position" MESA refutes Cowin's contention that the Board should not consider *Republic Steel*, maintaining that under *Rushton Mining Company*,<sup>4</sup> the ruling of *Republic Steel* applies to all cases currently pending in the Office of Hearings and Appeals.

### *Issue Presented on Appeal*

Whether MESA erred in issuing a 104(a) order of withdrawal to a contractor doing shaft construction work for a coal mine operator.

### *Discussion*

In analyzing the issue at hand, a brief review of pertinent administrative and judicial precedents respecting independent contractors is timely at this juncture. The first Board decision directly involving independent contractors arose under section 110 of the Act.<sup>5</sup> We ruled in *John Wilson & Ronald Rummel v. Laurel Shaft Construction Company, Inc.*, 1 IBMA 217, 226, 79 I.D. 701, 1971-1973 OSHD par. 15,387 (1972), *reconsideration denied*, 2 IBMA 1 (1973), that, pursuant to sec. 110(b)(1) of the Act, a coal mine construction company is a "person" as well as an "operator" and subject to the jurisdiction of the Administrative Law Judges or the Board.

In a section 104(b) proceeding,<sup>6</sup> *Republic Steel Corporation, supra*,<sup>7</sup> the Board, bound by a secretarial

order,<sup>8</sup> applied a policy directive of the Interior Department to the facts of that case. The substance of that holding is that a coal mine owner or lessee is the only party to be held absolutely liable for violations of the mandatory standards committed by a coal mine construction contractor.

Several sec. 109 penalty decisions<sup>9</sup> have been issued relative to independent contractors. Their captions and rulings follow: *Affinity Mining Company*, 2 IBMA 57, 60, 80 I.D. 229, 1971-1973 OSHD par. 15,546 (1973), held that only the operator (coal mine owner, lessee, independent contractor, etc.) responsible for the violation and the safety of employees can be the person served with notices and orders and against whom civil penalties may be assessed. We further ruled therein that the question of which party is the responsible operator is a factual determination to be made on a case-by-case basis. 2 IBMA 61. *Peggs Run Coal Company*, 5 IBMA 175, 82 I.D. 516, 1975-1976 OSHD par. 20,003 (1975), extended *Affinity* by finding a coal mine owner culpable of negligence in allowing defective trucks of an independent haulage contractor to load on the property of the owner who had full knowledge of the violative condition.<sup>10</sup> The Board

<sup>5</sup> Secretarial Order No. 2977, *supra*, 5 IBMA 308.

<sup>6</sup> 30 U.S.C. § 819 (1970).

<sup>10</sup> The controlling distinction between the *Peggs Run* and *Affinity* factual situations was summarized thus:

"\* \* \* in *Affinity* \* \* \* only employees and supervisory personnel of the contractor were present and endangered. Here, *Peggs Run* had some control over the route and the

<sup>4</sup> 5 IBMA 387, 1975-1976 OSHD par. 20,254 (1975).

<sup>5</sup> 30 U.S.C. § 820 (1970).

<sup>6</sup> 30 U.S.C. § 814(b) (1970).

<sup>7</sup> See n. 2, *supra*.

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took the position that, while the responsibility to equip the trucks with backup alarms may not belong to the coal mine owner, the owner could prevent "with a minimum of diligence" such nonequipped trucks from operating in an area where its employees alone are endangered. 5 IBMA 183. *West Freedom Mining Corporation*, 5 IBMA 329, 82 I.D. 618, 1975-1976 OSHD par. 20,230 (1975), involved facts similar to those in *Peggs Run* except that the independent contractor engaged in blasting, not haulage. We applied the *Peggs Run* rationale and found liability in the coal mine owner since the owner could have removed the hazards created by the contractor's negligence with a minimum of effort. 5 IBMA 335. Finally, in *Rushton Mining Company, supra*,<sup>11</sup> we determined that, based on *Republic Steel, supra*, the owner was liable for violations committed by a contractor engaged in constructing settling ponds on mine property irrespective of whether an independent contractor relationship between the contractor and owner had been proved. 5 IBMA 369.

Several Federal Courts have

loading-station location of the trucks once they entered its mine property. In *Affinity*, the same party was responsible for both the existence of the conditions cited, the health and safety of the employees involved, and the sole power to abate the conditions. \* \* \* The instant factual situation presents a division if these responsibilities, to wit, Dutch Bloom had failed to provide its trucks with backup alarms, while *Peggs Run* had the duty of insuring the safety of its miners in the loading area. No employees of Dutch Bloom were endangered." \* \* \* 5 IBMA 182.

<sup>11</sup> See n. 4, *supra*.

issued decisions in this area of the law. A three-judge District Court decision, *Association of Bituminous Contractors, Inc. v. Brennan*, 372 F. Supp. 16 (D.C.D.C. 1974), ruled that the determination by the Secretary of Labor that coal mine construction companies are operators within the meaning of the Act contravenes the legislative intent, scheme and purpose of Title IV<sup>12</sup> and, accordingly, interpreted sec. 3(d)<sup>13</sup> as not to include such companies.

The issuance of the aforecited *Republic Steel* secretarial order<sup>14</sup> was prompted by *Association of Bituminous Contractors, Inc. v. Morton*,<sup>15</sup> a declaratory judgment action.<sup>16</sup> The declaration of that Court was:

That a coal mine construction company is not an "operator" as defined in Sec. 3(d) of the Federal Coal Mine

<sup>12</sup> 372 F. Supp. 16, 25.

The Court reasoned:

"The Act was not intended by Congress to be applied to coal mine construction companies who do not actually engage in coal extraction operations. The reference in the statutory definition of a coal mine, Sec. 3(h) of the Act, to equipment, structures, and property 'to be used in' a coal mine was meant by Congress to refer solely to the extracting of coal. There is nothing in the legislative history of the Act which suggests Congress meant that the statutory definition should be applied so expansively as to include those companies which construct coal mines but do not extract coal from them." *Id.*

<sup>13</sup> Sec. 3(d) of the Act states:

"'operator' means any owner, lessee, or other person who operates, controls, or supervises a coal mine; \* \* \*." 30 U.S.C. § 802(d) (1970).

<sup>14</sup> See n. 3, *supra*.

<sup>15</sup> Civil Action No. 1058-74 (D.C.D.C., May 23, 1975), *appeal pending*, D.C. Nos. 75-1931 and 75-1932.

<sup>16</sup> A declaratory judgment order has the effect of a final district court order. 28 U.S.C. § 220 (1970).

Health and Safety Act of 1969, 30 U.S.C. § 802(d), where it is engaged in coal mine construction work on behalf of the owner, lessee, or other person who operates, controls or supervises a coal mine.<sup>17</sup>

Judge Gesell looked to the legislative history and found no reference to mine construction companies therein. He very clearly imposed a limitation on the Secretary's rule-making authority<sup>18</sup> when he stated:

The Secretary can undoubtedly place fines and other severe sanctions upon operators who do business with these contractors if the contractor fails to observe certain specified health and safety practices such as are delineated in the regulations. But this is not what he has done. The Secretary has gone beyond this and attempted directly to legislate by bringing contractors under his direct responsibility.

His administrative determination that coal mine contractors are subject to the health and safety provisions of the Act is legislation outside his authority. Only Congress can accomplish this result.

(P. 6 of Judge Gesell's "Bench Decision.")

With this Order as proper justification, the Judge invited the Board to hold (which it did in *Republic*

*Steel*) that a coal mine operator can be held vicariously liable for the acts of its independent contractors.

Finally, the District Court for the Western District of Virginia in another declaratory judgment action addressed the issue of whether MESA can enforce the Act and regulations promulgated thereunder against coal mining companies for violations caused by mine construction contractors. *Bituminous Coal Operators' Association, Inc. v. Hathaway*, 406 F. Supp. 371 (W.D. Va. 1975),<sup>19</sup> held that an independent mine construction contractor is the statutory agent of the operator.<sup>20</sup> Judge Turk's decision recounts the events leading up to the plaintiffs' complaints:

\* \* \* The controversy developed in June 1975 when MESA announced a change in its enforcement policy as a result of the decision of the United States District Court for the District of Columbia in *Association of Bituminous Contractors, Inc. v. Morton*, Civil Action No. 1058-74 (May 23, 1975). In that case Judge Gesell issued a judgment declaring that "a coal mine construction company is not an 'operator' as defined by Sec. 3(d) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 802(d), where it is engaged in coal mine construction work on behalf of the owner, lessee or other person who operates, controls or supervises a coal mine." Prior to this decision MESA had construed the term "operator" to include independent contractors engaged in mine construction work and thus had enforced the Act against them directly; however, in response to this decision the Secretary of the Interior directed MESA to issue

<sup>17</sup> The declaration continues:

"Nothing in the foregoing declaration shall affect or prejudice the right of the Secretary of the Interior to contend in a subsequent proceeding that, if a coal mine construction company fails to observe the interim mandatory health and safety standards of the Federal Coal Mine Health and Safety Act of 1969 and the regulations of the Secretary of the Interior promulgated thereunder, the Secretary may institute proceedings to seek compliance therewith and assess appropriate penalties against the owner, lessee or other person who operates, controls or supervises said coal mine."

<sup>18</sup> 30 U.S.C. § 811(a) (1970).

<sup>19</sup> This decision is presently on appeal in the Fourth Circuit (4th Cir. Nos. 76-1190 and 76-1191).

<sup>20</sup> 406 F. Supp. 371, 375.

citations to the operators of a coal mine in cases of violations created by contractors performing work for such operators.

(406 F. Supp. 371, 372-373.)

We note that the Court applauded the efforts of the Board (although rejecting its theory) in its attempt to forge a solution to the problem:

\*\*\* As a matter of equity it seems obvious that liability should be assessed directly against the party who has responsibility for and control over a violation. By requiring mining companies to assume responsibility for violations caused by independent contractors, there is an increased potential for contract and labor disputes. Undoubtedly indemnification provisions in contracts between the mining companies and contractors will become more common and increased litigation may result. As a matter of sound policy, the court has no difficulty in agreeing with the practice endorsed by the Board of Mine Operations Appeals in *Affinity Mining Co.*, *supra* of citing the party actually responsible for a violation. \*\*\*

(406 F. Supp. 371, 375.)

Agreeing with *Brennan*, *supra*, that construction contractors are not "operators" under the Act, Judge Turk took one step further by ruling that, as statutory "agents" of operators, their activities are subject to regulation under Titles II and III of the Act. This conclusion is in conformity with *Morton*, *supra*, and renders mining companies vicariously liable for health and safety violations attributable to contractors.<sup>21</sup>

The Board is in accord with MESA's final position statement

advocating *Republic Steel* as dispositive of the issue at hand. Although detailing a state of facts based upon a sec. 104(b) withdrawal order, *Republic Steel* incorporated Secretarial Order No. 2977 which is all-embracing in its scope of applicability:

Sec. 1 Purpose. (a) The purpose of this order is to direct Mining Enforcement and Safety Administration to \*\*\* issue appropriate citations for violations of the Federal Coal Mine Health and Safety Act of 1969 and/or for hazardous conditions or practices \*\*\* to the operator of the coal mine on whose behalf the contractor is performing work. [Italics added.]

While this language on its face appears to be all-inclusive, insufficient consideration seemingly has been given to the urgency of a sec. 104 (a) order citing an imminent danger. The citing of an operator who may be far removed from the danger site may result in procedural and administrative delay never contemplated by the authors of the Act and permit a sufficient time lag for the feared disaster to become a reality.

Furthermore, we reject Cowin's contention that the Secretarial Order affects only those disputes involving citations issued after May 24, 1975, and therefore should not be considered by the Board. Any controversy presently pending in the Office of Hearings and Appeals is decided based on the most current law, not the law in existence at the moment of issuance of a citation. In addition, we reject UMWA's

<sup>21</sup> *Id.*

suggestion that we defer a decision in the instant case pending resolution of *Morton, supra*, in the District of Columbia Circuit Court of Appeals. The Secretary, instead of seeking a stay of Judge Gesell's order in *Morton*, issued Secretarial Order No. 2977. The procedure outlined in that Order was in turn affirmed by Judge Turk in *Hathaway*. That decision has been appealed to the Fourth Circuit Court of Appeals. At this point we do not know which Circuit Court will rule first or what the effect of either decision might be. Today's decision breathes continued life into the Secretarial Order and provides, at least for the time being, an articulation of current law on a troublesome subject. Accordingly, we reverse.

### ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Judge's decision and Order in the above-captioned case ARE REVERSED, the Application for Review IS GRANTED, and the Order of Withdrawal IS VACATED.

JAMES R. RICHARDS,

*Director, Office of Hearings  
and Appeals. Ex Officio  
Member of the Board.*

I CONCUR:

HOWARD J. SCHELLENBERG, JR.,  
*Administrative Judge.*

### CHIEF ADMINISTRATIVE JUDGE DOANE, CONCUR- RING IN RESULT:

Although I agree that Judge Littlefield's decision dismissing the Application for Review and upholding the validity of the withdrawal order should be reversed, I would do so on entirely different grounds.

In the majority opinion, under the caption "Contentions on Appeal," Cowin's major contention is stated to be that Cowin is exempt from the Act. But the majority fails to mention that Cowin's claim of exemption is based in part on sec. 4 of the Act, 30 U.S.C. § 803 (1970), and is not confined to the argument that Congress did not intend the Act to cover the health and safety of employees of construction contractors.

Sec. 4 of the Act, 30 U.S.C. § 803 (1970), provides as follows:

*Mines subject to coverage.*

Each coal mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act.

It seems reasonable to me that Congress, by the foregoing language, clearly indicated that it did not intend that every coal mine, operator thereof, or miner therein, be subject to the Act. On the contrary, to state the language of that section conversely, *unless* the products of a coal mine *enter* commerce, or unless the *operations* of such mine or the *products* of such mine

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affect commerce, such mine, each operator, thereof, and every miner therein, shall be exempt from the provisions of this Act.

It is admitted here that Cowin was engaged as an independent construction contractor by U.S. Pipe and Foundry Company to construct three shafts at the latter's coal mine, but that the construction was not completed and was being performed on raw, virgin ground. In other words, no coal had been or was being produced at the time the withdrawal order was issued, the result being that there were no products of the mine which were entering or were affecting interstate commerce. The only reason that the area under construction can even be described as a "coal mine" is because of the technical definition of that term in sec. 3(h) of the Act, 30 U.S.C. § 802(h) (1970).<sup>1</sup>

The basic issue, then, comes down to the question of whether the operation (construction of the initial shafts) at the subject mine was affecting interstate commerce at the time the subject withdrawal order was issued.

The term "affecting commerce" has been treated by the courts as a term of art and has been generally interpreted, when dealing with the federal right to regulate intrastate activities, to require such modifiers as "substantial," "far from trivial," and "close and substantial." *NLRB v. Jones & Laughlin Steel Corp.*,

301 U.S. 1 (1937); *Wickard v. Filburn*, 317 U.S. 111 (1942); *FTC v. Bunte Bros.*, 312 U.S. 349 (1941); *U.S. v. Perez*, 402 U.S. 146, 150-153 (1971); *Local Union No. 12, Progressive Mine Workers of America, District 1 v. NLRB*, 189 F.2d 1 (7th Cir.), cert. denied, 342 U.S. 868 (1951).

Two court cases have dealt specifically with the phrase "affect commerce," as contained in section 4 of the Federal Coal Mine Health and Safety Act of 1969. In *Sink v. Kleppe*, 538 F. 2d 325, n. 2, No. 75-2278 (4th Cir., July 6, 1976), the Court of Appeals indicated that even though some of the products (coal) of a two-man mine operated by Sink did "enter commerce," the position (taken by the Administrative Law Judge) that Sink's products did "affect" commerce within the meaning of the Act was not sustainable. In *Morton v. Bloom*, 373 F. Supp. 797 (W.D. Pa. 1973), the court held that the defendant's mine was not subject to the Act because it did not "exert a substantial economic effect on interstate commerce."

I have great difficulty understanding how the construction of mine shafts on raw ground, where no coal is produced, can *substantially* affect interstate commerce. Consequently, I would hold, based on the established facts of this case and on the precedents, that the operations of the subject mine here did not affect interstate commerce and that, therefore, by virtue of the provisions of section 4, neither

<sup>1</sup> See n. 1, *supra* at 355.

Cowin nor U.S. Pipe and Foundry Company, regardless of which may be deemed to be the operator, can be held to have been responsible for any condition or practice occurring at such mine when the subject withdrawal order was issued.

I further believe that such result would not deprive Cowin's employees of federal health and safety protection. It is apparent to me that they would be covered by secs. 3, 4, 5 and 8 of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 652, 653, 654, 657, *et al.* (1970). I recognize of course that my reasoning would yield an inefficient federal enforcement effort and could subject construction contractors to different regulations over the same activity depending on whether the mine in question is subject to the Act. However, the disruptive effect of such inefficiency could be avoided by joint promulgation of the same standards by the Secretary of the Interior and the Secretary of Labor, and in any event, inefficiency is no basis for distorting the language of the Act.

On the basis of the foregoing, I would not reach the secondary question of whether Cowin was properly named in the subject withdrawal order in light of the provisions of Secretarial Order No. 2977 which was issued on Aug. 21, 1975, with an effective date of May 24, 1975. The majority, however, has seen fit to do otherwise and has in effect concluded that, under the Secretarial Order, U.S. Pipe and Foundry rather than Cowin should have been named. In so concluding,

the majority has overlooked the fact that the subject withdrawal order was issued on Nov. 3, 1973, approximately 19 months prior to the effective date of the Secretarial Order, at a time when the governing authority was *Affinity Mining Company*, 2 IBMA 57, 80 I.D. 229, 1971-1973 OSHD par. 15,546 (1973). I have my doubts as to whether the Secretary intended to allow any retrospective effect to his order beyond the date specified therein, and further, I am not at all sure that further retrospective effect *can* be given in the circumstances of this case. See *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947); *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966); and *Retail, Wholesale & Department Store Union, AFL-CIO v. NLRB*, 466 F.2d 380, 389-390 (D.C. Cir. 1972). However, since I think that the Board need not reach this secondary issue raised by Cowin and stemming from the Secretarial Order, and because I can agree with the result reached by the majority solely on the basis of the application of sec. 4 of the Act, I will await an appropriate future case to express my final conclusions with regard to the retroactivity question.<sup>2</sup>

DAVID DOANE,

*Chief Administrative Judge.*

<sup>2</sup> In *Rushton Mining Company*, 5 IBMA 3671, 1975-1976 OSHD par. 20,254 (1975), the Board *sub silentio* applied the Secretarial Order in a civil penalty proceeding to citations issued prior to May 24, 1975. At oral argument, Cowin asked that *Rushton* be overruled, and I, for one, would be willing at least to consider doing so at some future time in the appropriate case.

## POCAHONTAS COMPANY

*September 30, 1976*

**ISLAND CREEK COAL COMPANY  
AND  
VIRGINIA POCAHONTAS  
COMPANY**

7 IBMA 1

Decided *September 30, 1976*

Appeal by the United Mine Workers of America from a decision by Administrative Law Judge Franklin P. Michels (Docket Nos. M 75-48, M 75-50 and M 75-49, consolidated below), dated July 17, 1975, granting petitions for modification filed by Island Creek Coal Company and Virginia Pocahontas Company pursuant to sec. 301(c) of the Federal Coal Mine Health and Safety Act of 1969.

Vacated and remanded.

**1. Federal Coal Mine Health and Safety Act of 1969: Hearings: Summary Decisions**

Where no party has moved for summary decision under 43 CFR 4.590, it is error for an Administrative Law Judge to use that regulation as a basis for proceeding to a decision in the absence of a hearing.

**2. Federal Coal Mine Health and Safety Act of 1969: Hearings: Waiver**

Where a party to a proceeding has requested a hearing and there has been no unequivocal waiver thereof in writing, a hearing is required to be conducted by the provisions of 43 CFR 4.588, and failure to do so constitutes reversible error.

**APPEARANCES:** Steven B. Jacobson, Esq., for appellant, the United Mine Workers of America.

*OPINION BY CHIEF ADMINISTRATIVE JUDGE DOANE*

*INTERIOR BOARD OF MINE OPERATIONS APPEALS*

*Factual and Procedural Background*

This is an appeal by the United Mine Workers of America (UMWA) from a decision by Administrative Law Judge Franklin P. Michels (Judge), dated July 17, 1975. The decision granted four petitions for modification of the application of mandatory safety standards pursuant to sec. 301(c) of the Federal Coal Mine Health and Safety Act of 1969 (Act).<sup>1</sup> The UMWA is appealing with respect to three of those petitions which were assigned Docket Nos. M 75-48, M 75-49 and M 75-50 in the proceeding below. The UMWA is the representative of the miners at the three mines involved.

The proceedings before the Office of Hearings and Appeals began on Sept. 20, 1974, when Island Creek Coal Company filed two petitions for modification of 30 CFR 75.521 as applied to its Virginia Pocahontas Nos. 3 and 4 Mines. The petitions were assigned Docket Nos. M 75-48 and M 75-50. On that same date, Virginia Pocahontas Company filed a petition for modification of the application of the same sec. of the regulations to its Virginia Pocahontas No. 2 Mine. That

<sup>1</sup> 30 U.S.C. § 861(c) (1970).

petition was assigned Docket No. M 75-49. All three petitions proposed essentially the same alternative system for compliance with the objectives of 30 CFR 75.521.

Timely answers to all three petitions were filed by the Mining Enforcement and Safety Administration (MESA) and the UMWA on Oct. 9 and 15, 1974, respectively. MESA's answer stated that it could neither admit nor deny the allegations made but that it demanded strict proof thereof. Its answer further gave notice that MESA would cause a complete investigation of the proposed modification to be made and that a copy of the report of the investigation would be filed with the Office of Hearings and Appeals in the form of an amended answer. The UMWA's answer stated summarily that the proposed modification would not, at all times, guarantee no less than the same measure of protection afforded to the miners by the application of the mandatory safety standard, and *further requested a hearing* on the matter.

As is required by the Act and the regulations, the Secretary caused publication of notice of the three petitions in the *Federal Register*. 39 FR 38688-91, Nov. 1, 1974. Each publication conformed to the requirements of the regulations, that is, each gave a general recounting of the background facts and indicated that any interested party could request a hearing or furnish comments within 30 days after publication.

On Mar. 26, 1975, MESA filed an amended answer with respect to each of the three dockets herein involved, praying that the petition for modification not be granted in light of an attached report of the investigation anticipated in MESA's original answer. The report suggested that three changes be made in the proposed modifications in order that they attain the status of being as safe as or safer than what the mandatory safety standard required.

On Apr. 14, 1975, Island Creek Coal Company and Virginia Pocahontas Company filed amended petitions for modification which incorporated the changes suggested by the MESA investigation. Petitioners served both other parties with copies of these amended petitions. In response thereto, on May 13, 1975, MESA filed an answer to each of the amended petitions in which it stated that the petition should be granted. A second series of publications giving notice of the amended petitions was made in the *Federal Register*, 40 FR 20, 968-69, May 14, 1975. Each of these publications recited the obligatory background facts to its case and gave the usual 30-day deadline for requesting a hearing or furnishing comments. The UMWA did not in any way respond to the amended petitions nor to the second series of publications.

Judge Michels issued his decision on July 17, 1975. Citing his authority to grant "summary decisions" under 43 CFR 4.590(b), Judge

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Michels granted the petitions. Judge Michels never held an evidentiary hearing because he felt that no hearing had been requested and that there was no dispute over evidentiary facts such as would require a hearing (Dec. 4).

On Aug. 7, 1975, the UMWA filed a notice of appeal of the Judge's decision. The UMWA timely filed a brief in support of its appeal on Aug. 27, 1975. In the brief, the UMWA claimed that it was denied the hearing it requested in its answer. Neither Virginia Pocahontas Company, Island Creek Coal Company, nor MESA has filed any documents with respect to this appeal.

### *Issues on Appeal*

1. Whether the Judge erred either in relying on 43 CFR 4.590(b) as authority for deciding the case or in failing to hold a hearing in the absence of compliance with 54 CFR 4.588.

2. Assuming that the Judge did err by not complying with the foregoing regulations, whether such error constitutes reversible error requiring vacation of the summary decision and remand of the proceeding.

### *Discussion*

#### A.

[1] The Judge, as noted, relied upon the "summary decision" regulation, 43 CFR 4.590, as the basis for his authority for resolving the

case before him in the absence of a hearing. By its own terms this regulation requires that a proponent move the Judge "to render summary decision." There was no motion of that nature here, and, even if there had been, such a motion would imply an opportunity for an adverse party to have a hearing on the motion or at least to file affidavits, depositions or other like papers controverting movant's grounds for the right to the relief requested. This procedure was not followed here. See *Kings Station Coal Corporation*, 2 IBMA 291 (1973), wherein we made clear that a motion by one of the parties is a prerequisite to proceeding under the "summary decisions" regulation. Thus, the Judge erred in basing his disposition of this proceeding on a decision under 43 CFR 4.590.

The other procedural regulation pertinent to this proceeding is 43 CFR 4.588(b) which provides as follows:

(b) Parties entitled to an evidentiary hearing may waive such right in writing, but unless all entitled parties file timely waivers, a hearing will be conducted. Such waivers must be unequivocal and request the Administrative Law Judge to decide the matter at issue on the pleadings and written record of the case including any stipulation the parties might enter.

Here, the UMWA was a party entitled to an evidentiary hearing. It filed answers to the original petitions in which it requested a hearing in the proceeding and filed no waiver of hearing. The record indi-

cates no dismissal of the proceeding, but on the contrary, clearly shows that the original petitions and publications were merely changed to conform to the three changes in the proposed modifications suggested by MESA. The original proceeding, as such, remained intact. The fact is that not only did the UMWA not file a written waiver of hearing but neither did either of the other two parties. Consequently, since no party filed any kind of a waiver of hearing, the unambiguous language of this regulation compels our conclusion that error was committed by not conforming to the strict and mandatory requirements thereof.

### B.

To determine whether the foregoing errors dictate vacation and remand as claimed by UMWA, we should examine the procedural history of the case to the point when the Judge made his decision. In that posture we note that the UMWA does not have a particularly attractive factual situation from which to argue.

The UMWA was duly notified of every filing made in this proceeding. In particular, the UMWA has not denied that it was notified of the amended petition by the *Federal Register* publication. Further, the UMWA was put on notice that at least MESA apparently felt that a pleading responsive to the amended petitions was called for in that the UMWA was

served with a copy of MESA's answer responding to those amended petitions. The UMWA was certainly apprised of the fact that the factual and procedural setting had been substantially altered since the time it filed its answer to the original petitions. Yet despite the changed circumstances, the full and adequate notice thereof and the view held by UMWA that "modifications are serious things" (see Brief of UMWA, p. 3), the UMWA failed to take any affirmative action to protect its rights throughout the period after the filing of the amended petitions, and indeed, going back further, during the period when MESA and the operator were working to arrive at a suitable resolution. Actually, the degree of the UMWA's inaction in this case indicates either that counsel was oblivious to the need, in the exercise of professional propriety, directly to notify the other parties and the Judge of his intention to preserve the hearing rights of the UMWA or, quite simply, that he neglected this case until after the Judge made his decision.

With the weakness of the UMWA's position thus exposed, it would be easy enough to fashion a legal argument based upon reason and precedent to support a decision of affirmance of the Judge's decision. The Judge, after all, thought that the UMWA had no objection to his proceeding to decision, and from all appearances he was correct in that thinking and would have

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been in all those jurisdictions where ordinary procedural rules relating to amended and supplemental pleadings apply (Dec. 4).<sup>2</sup>

However, there are two principal reasons why we must agree with the UMWA that it is entitled to a vacation and remand.

First, inadequate as the procedural regulations may be, we, and the Administrative Law Judge alike, are bound to follow them.<sup>3</sup> As pointed out above, the Judge here erred by not doing so with respect to both 43 CFR, 4.590 and 43 CFR 4.588(b). There is no way we can find this error to be harmless or to have no prejudicial effect on the rights of UMWA. The right to an evidentiary hearing is a fundamental element of administrative due process. That right was denied UMWA under the technical provisions of these two regulations.

<sup>2</sup> The Judge may well have thought that the operator's amended petitions required new responsive pleadings, and in the absence thereof, he could treat the UMWA as "out" of the case or never "in" in the first place. If that were his reasoning, it is clear that the deficiency of the regulations in providing guidance in amendment or supplemental pleading practice may well have affected him. By the same token, the regulations afforded the UMWA no better guidance on how to proceed, and that fact has been a mitigating factor in how we viewed what otherwise appears to be a case of careless practice. It is becoming clear to the Board that cases like the instant one will continue to occur as long as the procedural regulations are allowed to fall short of providing clear and cogent guidance to parties and tribunals alike.

<sup>3</sup> *United States v. Nixon*, 418 U.S. 683 (1974); *Service v. Dulles*, 354 U.S. 363 (1957); *Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

Secondly, we are not only concerned with UMWA's procedural rights, but, more importantly, with the safety of the miners at the coal mines which are the subjects of the petitions in this proceeding. We must assume that the UMWA has a genuine dispute with petitioners and MESA on the question of whether, if granted, the proposed modifications will be as safe for the miners as or safer than the unmodified application of the mandatory safety standards contained in 30 CFR 75.521. In this same line of thought, we must further assume that UMWA arguably has, and will produce, substantial and persuasive evidence in opposition to the evidence produced by the other parties in support of the petitions.

## ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision in the above-captioned case IS VACATED and the case IS REMANDED to the Judge for further proceedings to allow the UMWA the opportunity for a hearing to oppose the "amended" petitions herein.

DAVID DOANE,

*Chief Administrative Judge.*

I CONCUR:

DAVID TORBETT,

*Alternate Administrative Judge.*

## ADMINISTRATIVE JUDGE SCHELLENBERG DISSENT- ING:

The only question presented by UMWA in this appeal is whether the Judge erred in concluding that UMWA had no objections to the amended petition for modification. I think not and would affirm.

UMWA agrees that a modification petition can be summarily granted where all parties agree and there are no objections and that no stipulation is necessary in such cases and that the ALJ can issue a decision based solely upon the pleadings (UMWA Brief, p. 3).

The crucial factor in this determination is the effect publication in the *Federal Register* of the amendments to the original petition for modification had upon the rights of UMWA. In my opinion, this publication gave notice to UMWA and the world that objections and/or comments were invited based upon the new revised petition, and the failure of a person to respond must be deemed a waiver of any rights it has or had in the past. The agency must be free to decide on that basis or there will never be an end to litigation.

In *Gateway Coal Company*, 2 IBMA 107, 80 I.D. 382, 1971-1973 OSHD par. 15,785 (1973), this Board denied participation to UMWA where is filed objections following a republication of an amended modification on the grounds that it had *actual* notice of all prior proceedings, its only response was an answer filed subsequent to the original petition and

that its nonparticipation had been of its own choosing. The Board stated, "The time has come to conclude this litigation."

I believe UMWA has had more than sufficient notice and that its failure to take any action to protect its position was of its own doing and it cannot now be heard to request that a hearing be held on its objection to a petition which has been revised and amended. UMWA should have known the amended petition was ripe for decision immediately upon expiration of the time specified in the *Federal Register* for the receipt of objections and/or comments.

In *Harmar Coal Company*, 3 IBMA 32, 81 I.D. 103, 1973-1974 OSHD par. 17,370 (1974), the Board recognized the mandatory nature of a *Federal Register* publication when it stated:

The United Mine Workers of America, as representative of the miners at Harmar Mine, was served with a copy of Harmar's petition, MESA's answer and the Notice of Hearing, but did not file an answer or otherwise comment upon the petition on or before December 13, 1973, as required by the official notice of the petition published at 38 F.R. 31318, Nov. 13, 1973.

I perceive no difference between the publication of an original petition (as in *Harmar*) and publication of an amended petition insofar as the *requirement* for timely response is concerned. The sole reason for publication is to elicit comments and objections and absent such a Judge has every right to assume there are no objections.

In my opinion publication in the *Federal Register* supersedes any re-

## (ON RECONSIDERATION)

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quirement, if there be such, for the issuance of a show cause order, particularly where the record shows that the complaining party had *actual* notice of all pleadings and positions of the parties. The examples cited by UMWA in Exhibits A & B to its brief are inapposite since I am unable to find a republication of the amended petition in either case, a fact which I consider to be decisive in this case.

I respectfully dissent.

HOWARD J. SCHELLENBERG, JR.,  
*Administrative Judge.*

**EASTERN ASSOCIATED COAL  
CORPORATION  
(ON RECONSIDERATION)**

**7 IBMA 14**

*Decided September 30, 1976.*

Petition for Reconsideration by Eastern Associated Coal Corporation of parts of the Board's decision of Sept. 30, 1975, on cross-appeals from a civil penalty decision by Administrative Law Judge Charles C. Moore under sec. 109 of the Federal Coal Mine Health and Safety Act of 1969.

Decision below reversed in part, and affirmed in part.

**1. Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Permissibility: Switches on Electric Face Equipment**

Failure to maintain the reset mechanism on electric face equipment in op-

erative condition is not a violation of an operator's obligation under 30 CFR 75.505 to maintain electric face equipment in permissible condition.

**2. Federal Coal Mine Health and Safety Act of 1969: Respiratory Dust Program: Generally**

A notice of violation of 30 CFR 70.100 (a) must be vacated where an operator overcomes MESA's prima facie case by establishing as an affirmative defense by a preponderance of the evidence that it was cited for concentrations of dust which are not wholly "respirable" within the meaning of the Act and regulations. 30 U.S.C. § 878(k) (1970) and 30 CFR 70.2(i).

Board decision, Eastern Associated Coal Corporation, 5 IBMA 185, 82 I.D. 506, 1975-1976 OSHD par. 20,041 (1975), set aside in part on reconsideration.

**APPEARANCES:** James R. Kyper, for petitioner, Eastern Associated Coal Corporation; Robert W. Long, Esq., Associate Solicitor, Thomas A. Mascolino, Esq., and Robert A. Cohen, Esq., for respondent, Mining Enforcement and Safety Administration; Guy Farmer, Esq., and William A. Gershuny, Esq., for amicus curiae. Bituminous Coal Operators' Assn.

*OPINION BY CHIEF ADMINISTRATIVE JUDGE  
DOANE*

**INTERIOR BOARD OF MINE  
OPERATIONS APPEALS**

On Dec. 16, 1974, Administrative Law Judge Moore issued a decision upon consolidated civil penalty

dockets under sec. 109 of the Federal Coal Mine Health and Safety Act of 1969. 30 U.S.C. §819 (1970). Cross appeals by Eastern Associated Coal Corporation (Eastern) and the Mining Enforcement and Safety Administration (MESA) followed and were docketed as Appeal Nos. IBMA 75-23 and IBMA 75-25, respectively. 43 CFR 4.600.

We reviewed the rulings challenged by Eastern and MESA in a lengthy decision reported at 5 IBMA 185, 82 I.D. 506, 1975-1976 OSHD par. 20,041 (1975). These cross appeals are now before us pursuant to a petition by Eastern for reconsideration in part which we granted on Dec. 4, 1975. 43 CFR 4.21(c). Oral argument was held on Jan. 21, 1976, and subsequently the parties filed supplementary briefs. On reconsideration, we have also had the benefit of the views of the Bituminous Coal Operators' Assn. participating as an amicus curiae.

### *Issues on Reconsideration*

A. Whether, in Appeal No. IBMA 75-23, the Board erred in concluding that the failure by Eastern to maintain reset mechanisms on electric face equipment in working order constituted a violation of 30 CFR 75.505.

B. Whether, in Appeal No. IBMA 75-25, the Board erred in concluding, as a matter of law, that MESA had sustained the validity of 22 notices of violation of the respirable dust standards.

### *Discussion*

#### A.

#### *Appeal No. IBMA 75-23*

[1] In our original decision, we sustained an assessment of civil penalty in Docket No. MORG 73-145-P based on Notice of Violation No. 4 SBP (Mar. 3, 1972). 5 IBMA at 195-196. The subject notice cited Eastern for inoperative reset mechanisms on the respective stop and start switches of the pump motor on a continuous miner and the gathering motor on a loading machine. MESA charged that these conditions were violative of Eastern's obligation under 30 CFR 75.505 to maintain electric face equipment in permissible condition. Judge Moore agreed with MESA and we affirmed on the theory that 30 CFR 75.520, a statutory provision dealing with switches on electric equipment, stated a specification of permissibility which fell within an operator's list of maintenance obligations under 30 CFR 75.505.<sup>1</sup>

Throughout this proceeding, there has been no dispute over the

<sup>1</sup> Sec. 75.520 of 30 CFR tracks 30 U.S.C. § 865(o) (1970) word for word. Sec. 75.505 of 30 CFR is virtually the same as 30 U.S.C. § 865(a)(12)(c) (1970), and provides as follows:

"Any coal mine which, prior to [Mar. 30, 1970,] was classed gassy under any provision of law and was required to use permissible electric face equipment and to maintain such equipment in a permissible condition shall continue to use such equipment and to maintain such equipment in such condition."

## (ON RECONSIDERATION)

September 30, 1976

basic facts; Eastern had admitted all along that the disputed reset mechanisms were inoperative. The issue Eastern raised with regard to the validity of the subject notice was purely legal. Eastern has argued that there is no applicable and effective permissibility specification under 30 CFR 75.505 laying down legally enforceable obligations with respect to reset mechanisms on electric face equipment.

Judge Moore did not deal with this problem, apparently reasoning that once the evidence reveals an inoperative switch on electric face equipment, a violation of 30 CFR 75.505 is established *ipso facto* (Dec. 9). In so thinking, he was in error because that regulation necessarily requires reference to a specific catalog of permissibility conditions.

Our original view was that his error was harmless because we thought 30 CFR 75.520 could provide the missing link in the chain of legal conclusions necessary to support the assessment of civil penalty ultimately ordered by the Judge. We arrived at that conclusion by taking the general definition of the term "permissibility" in sec. 318(i) of the Act, 30 U.S.C. § 878(i) (1970), and findings therein a basis for taking any mandatory safety standard falling within the ambit of such definition and declaring it a benchmark for compliance

with 30 CFR 75.505.<sup>2</sup> Armed with this line of reasoning, we felt able to brush aside Eastern's argument that there was no pertinent effective permissibility specification under 30 CFR 75.506, a regulation codified just after 30 CFR 75.505 and captioned "Electric face equipment; requirements for permissibility."

Further study on reconsideration has persuaded us that our initial response to this phase of Eastern's appeal is not sustainable. On second thought, we now conclude that our original interpretation of sec. 318 (i) does not reflect what the Congress intended and is inconsistent

<sup>2</sup> Sec. 318 (i) provides as follows:

"(i) 'permissible' as applied to electric face equipment means all electrically operated equipment taken into or used in by the last open crosscut of an entry or a room of any coal mine the electrical parts of which, including, but not limited to, associated electrical equipment, components, and accessories, are designed, constructed, and installed, in accordance with the specifications of the Secretary, to assure that such equipment will not cause a mine explosion or mine fire, and the other features of which are designed and constructed, in accordance with the specifications of the Secretary, to prevent, to the greatest extent possible, other accidents in the use of such equipment; and the regulations of the Secretary or the Director of the Bureau of Mines in effect on the operative date of this title relating to the requirements for investigation, testing, approval, certification, and acceptance of such equipment as permissible shall continue in effect until modified or superseded by the Secretary, except that the Secretary shall provide procedures, including, where feasible, testing, approval, certification, and acceptance in the field by an authorized representative of the Secretary, to facilitate compliance by an operator with the requirements of sec. 305(a) of this title within the periods prescribed therein."

with the Secretary's regulatory enforcement policy thereunder.

The definition of "permissibility" in sec. 318(i) was intended, we believe, as a guideline for the Secretary in perpetuating or innovating permissibility requirements once the Act became effective.<sup>3</sup> The use of the word "specifications" suggests that permissibility requirements include only those intended and labeled *as such* by the Secretary. And in carrying out his specifying function, the Secretary has promulgated a complex regulation setting forth expressly or incorporating by reference the exclusive list of permissibility specifications which constitutes as well a list of maintenance obligations under 30 CFR 75.505. That regulation is 30 CFR 75.506.

At the hearing in this case, the issuing inspector, Stark B. Powers, somewhat vaguely testified on cross-examination that Schedule 2G (Mar 13, 1968) might contain the applicable permissibility specification (Tr. 70). Schedule 2G is incorporated by reference in 30 CFR 75.506(b) and is codified at 30 CFR Part 18. Inspector Powers' testimony constituted MESA's sole effort at identifying the permissibility specification upon which the subject citation under 30 CFR 75.505 could have been based.<sup>4</sup> In going beyond the inspector's theory and outside the boundaries of 30 CFR 75.506, we mistakenly em-

ployed a theory which created permissibility policies not adopted by the Secretary, *as such*, and which undoubtedly generated considerable confusion and uncertainty as to the extent of maintenance obligations under 30 CFR 75.505.<sup>5</sup>

We now draw back by setting aside our initial conclusions, and we turn to the question of whether Schedule 2G contains a permissibility specification covering reset mechanisms on stop and start switches, a question which may be answered very briefly.

Although, as we noted above, Inspector Powers suggested that there was such a specification in Schedule 2G, he could not point to a relevant one (Tr. 70). And our reading of the provisions of Schedule 2G has revealed none.<sup>6</sup> Accord-

<sup>5</sup> As we noted earlier, we thought originally that 30 CFR 75.520 could serve as a permissibility specification. We now agree with Eastern that this regulation is a separate mandatory safety standard. It may be that the "conditions" cited in the subject notice of violation constituted a violation of that standard, but Eastern was not cited thereunder and MESA never charged that such a violation had occurred. A notice of violation, although entitled to a reasonable construction, must be sustained by MESA as is, and it is not the function of an Administrative Law Judge or the Board to go beyond the charge and engage in rehabilitation of a citation. Compare *Bishop Coal Company*, 5 IBMA 231, 248, n. 11, 82 I.D. 533, 1975-1976 OSHD par. 20,165 (1975) with *National Realty and Construction Co., Inc. v. OSHRC*, 489 F.2d 1257, 1267-8 (D.C. Cir. 1973).

<sup>6</sup> On cross-examination, Inspector Powers was asked: "Is there any publication or regulation, schedule, anything like that that applies to and defines the permissibility requirements designed or otherwise for the switches and the equipment that they go with?"

He replied: "The only thing that I could think of right off-hand would be under the 2(g) schedule where if they would have to change switches to a different type of switch, they would probably have to go to a bigger switch. They would have to go to a field chain."

<sup>3</sup> The statutory language shows that it was intended in part to provide continuity with regulatory permissibility specifications which antedated the Act.

<sup>4</sup> Neither MESA's brief on appeal nor its brief on reconsideration advanced any responsive argument on this point.

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ingly, we conclude that Eastern was improperly cited for a failure to maintain electric face equipment in permissible condition on the erroneous assumption that the omission in question, the failure to maintain the reset switch mechanism in working order, pertained to an existing permissibility specification. Therefore, the subject notice must be vacated and the assessment of civil penalty based thereon set aside.

## B.

*Appeal No. IBMA 75-25*

[2] We come now to the question of whether we properly sustained the validity of 22 notices of violation issued under sec. 104(i) of the Act for alleged noncompliance with the Secretary's respirable dust standards. 30 U.S.C. § 814(i) (1970), 30 CFR 70.100(a).

Judge Moore had found that Eastern successfully established inaccuracies in MESA's sampling system, unsanctioned by the regulations, which he thought overcame the prima facie case established when the subject notices were authenticated and accepted in evidence. *See Castle Valley Mining Company*, 3 IBMA 10, 81 I.D. 34, 1973-1974 OSHD par. 17,233 (1974). He also found that it was impossible to discover the identity of the laboratory technician who processed the samples involved in the subject notices due to lack of recordkeeping. Based on the former finding, he held that these notices were substantively invalid and should be vacated. Based on the lat-

ter, he concluded that an order vacating such notices was also compelled by MESA's inability to supply the name of the laboratory technician who dealt with any one sample, an inability which he thought fatal to MESA's case because it allegedly deprived Eastern of the full measure of administrative process due an operator under sec. 109(a) (3) of the Act. 30 U.S.C. § 819(a) (3) (1970).

On appeal, we reversed and remanded for the sole purpose of assessing appropriate civil penalties. We rejected Eastern's substantive challenges to MESA's sampling system on the theory that they constituted an attack on the regulations by which everyone in the Office of Hearings and Appeals is bound. 43 CFR 4.1. We also decided that Judge Moore's discovery holding was in error because we found that Eastern had not gone far enough to establish that discovery was impossible.

On reconsideration, Eastern strenuously argues that we completely misconceived the nature of its substantive objections to the dust sampling system which generated the subject notices. Eastern insists that those objections, found to be meritorious by the Judge, were not challenges to features of the sampling system ordained by the Act and regulations. In addition, Eastern attacks our discovery holding on the basis of citations to the evidence of record which did not appear either in its original brief or in the initial decision below.

Having had the benefit of oral argument and supplementary briefing, we are setting aside our decision with respect to the subject notices in its entirety. We are now persuaded that in at least one aspect Eastern's challenge to MESA's sampling system is not an attack on the regulations, but is in part a claim of nonconformance to such regulations. Eastern contended that the subject notices were erroneously based on analyses of concentrations of particulates which were not wholly "respirable dust" within the meaning of the exclusive definition of that term set forth in sec. 318(k) of the Act and 30 CFR 70.2(i), providing that "respirable dust means only dust particulates 5 microns or less in size." 30 U.S.C. § 878(k) (1970). Finding that Eastern established its claim by a preponderance of the evidence, we now affirm the vacation of these notices. We do not reach any of the issue regarding other alleged substantive errors in the sampling system, and we find it unnecessary to decide the discovery issue.<sup>7</sup>

The legal backdrop for this dispute may be described very simply. The respirable dust program is exclusively devoted to the enforcement of mandatory health standards the purpose of which is:

\* \* \* to provide, to the greatest extent possible, that the working conditions in

each underground coal mine are sufficiently free of respirable dust concentrations in the mine atmosphere to permit each miner the opportunity to work underground during the period of his entire adult working life without incurring any disability from pneumoconiosis or any other occupation-related disease during or at the end of such period. 30 U.S.C. § 841(b) (1970).

By definition set forth in sec. 201(a) of the Act, the interim mandatory health standards are the provisions of secs. 202 through 206 and pertinent provisions of sec. 318. 30 U.S.C. §§ 841, 842-846, and 878 (1970). Of these, the provisions pertinent to the case at hand are secs. 202 and 318(k). 30 U.S.C. §§ 842 and 878(k) (1970).

Sec. 202 set up a skeletal respirable dust program based principally on sampling by the operator of the amount of respirable dust in the mine atmosphere to which each miner is exposed. 30 U.S.C. § 842(a) (1970). Among other things, subsec. (b) of sec. 202 set forth the precise standards of care and the respective operative dates of such standards. 30 U.S.C. § 842(b) (1970). The standard alleged to have been violated in this case is sec. 202(b)(1) which was published without significant change by the Secretary and the Secretary of Health, Education, and Welfare in the *Federal Register*, 35 FR 5544, Apr. 3, 1970, and codified as 30 CFR 70.100(a). That regulation reads as follows:

Effective June 30, 1970, each operator shall continuously maintain the *average concentration* of respirable dust in the mine atmosphere during each shift to which each miner in the active workings

<sup>7</sup> While we neither express nor intimate any views on this issue, it goes almost without saying that the technician who processes a sample should identify himself somewhere by initialing laboratory analysis reports or otherwise, regardless of whether there is a legal obligation to do so.

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of such mine is exposed at or below 3.0 milligrams of *respirable dust* per cubic meter of air. [Italics added.]

The italicized term, "respirable dust," was defined in section 318(k), 30 U.S.C. § 878(k) (1970), as follows:

\* \* \* *only dust particulates 5 microns or less in size* \* \* \*. [Italics added.]

The term "average concentration" was also defined and the provisions of that definition appear in subsec. (f) of section 202, 30 U.S.C. § 842(f) (1970), which states:

For the purpose of this title, the term "*average concentration*" means a determination which accurately represents the atmospheric conditions with regard to *respirable dust* to which each miner in the active workings of a mine is exposed (1) as measured, during the 18 month period following the date of enactment of this Act, over a number of continuous production shifts to be determined by the Secretary and the Secretary of Health, Education, and Welfare, and (2) as measured thereafter, over a single shift only, unless the Secretary and the Secretary of Health, Education, and Welfare find, in accordance with the provisions of section 101 of this Act, that such single shift measurement will not, after applying valid statistical techniques to such measurement, accurately represent such atmospheric conditions during such shift. [Italics added.]

In legislating the interim respirable dust program, the Congress did not purport to enact all the procedural details or to establish immutable substantive elements subject to change only by statutory amendment. Both the Secretary and the Secretary of Health, Education,

and Welfare were given circumscribed rulemaking powers to shape the respirable dust programs, 30 U.S.C. §§ 811 and 957 (1970), and in some instances were directed to use such powers, 30 U.S.C. §§ 842 (a) and (d) (1970).

In employing the rulemaking authority granted by the Congress, both the Secretary and the Secretary of Health, Education, and Welfare have substantially altered the program. Under sec. 202(e), the Congress approved the MRE instrument as a device for sampling dust, but the MRE is a large, bulky instrument, and on March 11, 1970, the two Secretaries approved usage of alternative personal sampler units conforming to requirements and conditions now codified at 30 CFR Part 74. These regulations were promulgated pursuant to sec. 508 of the Act, 30 U.S.C. § 957 (1970), and the type of individualized portable personal sampler that produced the data upon which the subject notices were based was apparently approved under these regulations. Furthermore, on July 17, 1971, the two Secretaries, acting pursuant to sec. 101, modified the definition of the term "average concentration" set forth in sec. 202(f). By finding in accordance with sec. 101 that "*\* \* \* single shift measurement will not, after applying valid statistical techniques to such measurement, accurately represent \* \* \* atmospheric conditions during such shift,*" they retained the interim

definition of "average concentration" which had prevailed during the first 18 months and had related the determination of such concentrations to exposure levels "\* \* \* over a number of continuous production shifts \* \* \*."<sup>8</sup>

With this legal background firmly in mind, we turn now to the pertinent facts of this case which are largely undisputed.

The concentrations of alleged respirable dust which gave rise to the subject notices were collected, as noted above, by a device known as a personal air sampler. This device is a unit which is purchased by an operator and worn by the individual miner. Each device is supposed to duplicate the behavior of the human respiratory system which draws in air, filters larger particulates, and allows others to reach the lungs. Air is drawn into a sampler by a pump and battery-driven motor. It passes through a nylon cyclone 10 mm. in diameter which is supposed to separate the respirable from the nonrespirable particulates. Theoretically, only the former reaches the filter where the particulates are captured. The filter is the analog of the lobes of a human lung.

The manufacturer of the personal air sampler weighs each filter before

sealing it in the device and records the weight on an attached data card. After the sample is collected, the sampler is forwarded to a MESA laboratory. The laboratory involved in the case at hand is located in Pittsburgh, Pennsylvania.

At the laboratory, each sampler is opened and among other things the filter is weighed so that a comparison can be made with the weight recorded on the data card by the manufacturer. Theoretically, the result reflects the weight of the particulates which were being deposited on the lungs of the wearer of the sampler at the time the sample was taken.

The sampler is not an infallible device and laboratory technicians who process the samplers perform several operations to weed out those that produce invalid samples. A sample is invalid and must be rejected where the filter is contaminated by oversize particulates or otherwise. The crux of this case concerns the MESA practices for identifying invalid samples and the impact of such practices on the probative value of the subject notices.

According to the evidence of record, samples are arbitrarily divided into two categories by net weight gain. The dividing line is 6 milligrams. Only those samples showing a net weigh gain of 6 milligrams or more are screened for oversize particulates. The remainder are apparently included in the computation to determine noncompliance without any such screening.<sup>9</sup>

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<sup>8</sup> We note in passing that the regulations were not amended subsequently to reflect this change and still read as if the Secretary is supposed to determine whether the average concentration of respirable dust during each shift to which each miner is exposed exceeds the applicable limit, rather than whether the average concentration of respirable dust to which each miner is exposed over a number of continuous production shifts exceeds the applicable limit. See 30 CFR 70.100.

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<sup>9</sup> Deposition of Paul Parobeck, p. 23.

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Samples less than 6 milligrams are simply assumed to be valid without more.<sup>10</sup>

Samples showing a net weight gain of 6 milligrams or more are first screened with the naked eye. Where a technician can perceive granules of dust, the samples are discarded because particulates large enough to be so perceptible are at least 40 microns, or in other words, at least 8 times the size of "respirable dust" as that term is defined in sec. 318(k) and 4 times the size of the largest particulate which could be on the filter if the sampler worked properly. (*See Respondent's Exhibit No. 9, p. 3.*)<sup>11</sup>

If a sample is not discarded after unaided visual examination, it is then subjected to scrutiny under a stereo microscope. Ten areas of each sample are examined for particulates in excess of 10 microns.<sup>12</sup> If three particulates in excess of 10 microns are observed on each of the 10 fields examined, then the sample is discarded as contaminated and invalid. Anything less is not. Particulates between 5 and 10 microns in diameter are not regarded as oversize by the technicians. (*See Deposition of Paul Parobeck, p. 24.*)<sup>13</sup>

Having now set forth what the record does show, we deem it appropriate to pause here and underscore what the record does *not* show. We do so in order to make our precise, limited holding stand out in bold relief.

The record does not show the basis for MESA's practice of not examining filters for oversize particulates when the net weight gain is less than 6 milligrams. In fact, when Mr. Paul Parobeck, a MESA technician, was queried by Judge Moore as to the rationale for the 6-milligram dividing line, he replied in part: "It was an arbitrary figure based on early data purely \* \* \*." Counsel for MESA never sought to explore Mr. Parobeck's remark about "early data" (Tr. 420).<sup>14</sup>

With respect to those filters showing a net weight gain of 6 milligrams or more, the record is lacking in any rationale rooted in the evidence to account for the treatment of particulates 5 to 10 microns as "respirable dust." There is no expert testimony to explain fully the implication of a high reading on the personal air sampler for the weight of particulates on the filter which are 5 microns and less in size.

<sup>10</sup> *Id.*

<sup>11</sup> A micron is approximately one twenty-five thousandth of an inch. *See Respondent's Exhibit No. 9, p. 3.*

<sup>12</sup> The record does not make clear how a technician peering into a microscope is able to discriminate accurately among various sizes of particulates.

<sup>13</sup> The samples are discarded automatically after processing.

<sup>14</sup> Mr. Parobeck's full reply reads as follows: "It was an arbitrary figure based on early date purely; not required by, just a courtesy affect to the operator to eliminate and screen out any obviously bad samples." (Tr. 420.) The latter part of his reply is an irrelevant and incidentally erroneous conclusion of law, and the whole reply suggests the lack of any underlying scientific basis for the treatment of oversize particulates.

Nor is there any such testimony revealing the impact in terms of weight of including particulates between 5 and 10 microns, testimony which could conceivably have revealed whether MESA's error, assuming error *arguendo*, was harmless in the circumstances.

Lastly, the record is completely lacking in any expert testimony whatsoever which would show whether it is impossible to comply with the 5-micron standard.<sup>15</sup> Indeed it is fair to say that MESA made no effort at all to rebut Eastern's affirmative defense on the evidentiary level.

On the basis of the record as described above, we find that MESA has been systematically ignoring the legislative definition of the term "respirable dust" as meaning "\* \* \* only dust particulates 5 microns or less in size." (Italics added.) Based upon such finding and given that the subject notices were processed in accordance with the principles described above, it follows that the data memorialized in these notices, purporting to show alleged concentrations of "respirable dust," represent as well the weight of some particulates which are oversize if the legislative 5-micron definition is applicable. And the dispute over the legal applicability of that definition is the crux of this case and the sole basis of MESA's rebuttal to Eastern's affirmative defense.

<sup>15</sup> In his opinion, Judge Moore suggested that a change in the air-flow rate might solve the problem. By his own admission, however, that suggestion was not based on the evidence of record, and as such, amounted to sheer speculation (Dec. 18).

MESA has essentially argued that the evidence establishing Eastern's defense is beside the point because, so it is said, the definition in section 318(k) can be "\*\*\* ignored for purposes of measuring concentrations of respirable dust in a mine atmosphere \* \* \*." (Italics added.) Brief of MESA on appeal, p. 13. As authority for its extraordinary theory of legislative construction, MESA directs our attention to sec. 202(e) of the Act, 30 U.S.C. § 842 (e) (1970), 30 CFR Part 74 and the following technical publications of the Bureau of Mines: Report of Investigations 7772 (Respondent's Exhibit No. 6),<sup>16</sup> Information Circular 8484 (Respondent's Exhibit No. 4),<sup>17</sup> and Information Circular 8503 (Respondent's Exhibit No. 9).<sup>18</sup>

As noted earlier, sec. 202(e) authorizes use of the MRE instrument as a sampling device and directly permits the Secretary and the Secretary of Health, Education and Welfare to authorize other such devices. MESA suggests that the legislative authorization to use the MRE carried with it implied authority to ignore the 5-micron definition and to cite operators on the basis of raw data from the MRE. MESA contends that the Secretary's authorization to use personal

<sup>16</sup> Tomb, J.F., Treaffis, H.N., Nundell, R.L. and Parobeck, P.S., "Comparison of Respirable Dust Concentrations with MRE and Modified Personal Gravimetric Sampling Equipment," 1973.

<sup>17</sup> Schlick, Donald P. and Peluso, Robert G., "Respirable Dust Sampling Requirements Under the Federal Coal Mine Health and Safety Act of 1969," July 1970.

<sup>18</sup> Staff, Pittsburgh Field Health Group, "Sampling and Evaluating Respirable Coal Mine Dust—A Training Manual," February 1971.

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air samples to perform the same function as the MRE, 30 CFR Part 74, implied the same. MESA bases these implications on the fact that when working properly, the MRE collects particulates up to 7 microns in size while the personal sampler collects particulates up to 10 microns in size. (See Respondent's Exhibit No. 9, p. 3.)<sup>19</sup>

Starting with MESA's statutory argument, we are of the opinion that MESA's proposed construction of sec. 202 and 318(k) is untenable.

In the first place, under conventional canons of statutory construction, legislative definitions such as sec. 318(k) cannot be ignored, and MESA has cited no authority to the contrary. Legislative definitions must be given effect and harmonized with related provisions to the extent that the language allows, but under no circumstances can they be completely ignored. See *In the Matter of: Affinity Mining Company v. MESA*, 6 IBMA 100, 83 I.D. 108, 1975-1976 OSHD par. 20,651 (1976).

Second, the interim standards of care regarding "respirable dust," that is to say, the benchmarks of compliance to which an operator must adhere, are established as we said earlier, by secs. 202(b) and 318(k) as read together. More specifically, with regard to the subject notices, the applicable limit on the concentration of respirable dust

which could not be legally exceeded was " \* \* \* 3.0 milligrams of respirable dust per cubic meter of air," respirable dust being defined by section 318(k) as " \* \* \* only dust particulates 5 microns or less in size \* \* \*." <sup>20</sup> Compare 30 U.S.C. § 842(b)(1) (1970) with 30 U.S.C. § 878(k) (1970). MESA is arguing in substance that the interim standard was " \* \* \* 3.0 milligrams of respirable dust per cubic meter of air, respirable dust being defined by sec. 202(e) as particulates up to the size measured by the MRE which is 7 microns. Compare 30 U.S.C. § 842(b)(1) with 30 U.S.C. § 842(e) (1970). Apart from the nullifying effect with respect to sec. 318(k) acceptance of that argument would have, a basic infirmity in MESA's statutory argument is that section 202(e) was not and did not purport to be a definition of the term "respirable dust." While sec. 202(e) was not drafted in a completely unambiguous manner, it appears to have been intended simply to authorize use of the MRE instrument as a basic sampling device and to provide express power to authorize other devices to perform the same function.<sup>21</sup> We see nothing in the language of sec. 202(e) to suggest an intention on the part of Congress that notices of violation

<sup>20</sup> In some instances, Eastern was cited for excessive cumulative concentrations of "respirable dust." For the purpose of dealing with the issue of oversize particulates, it does not matter whether Eastern was cited for excessive average concentrations or excessive cumulative concentrations.

<sup>21</sup> As we stated earlier, the MRE is a bulky device and the Congress foresaw the need for more portable sampling devices.

<sup>19</sup> Data drawn from the personal air sampler is mathematically converted to figures representing equivalent readings on the MRE.

and withdrawal orders be issued under sec. 104(i) on the basis of raw data from the MRE or any device subsequently approved by the Secretary and the Secretary of Health, Education, and Welfare. And to read sec. 202(e) as if it were a definition of the term "respirable dust" in light of the unambiguous and different definition of that term in sec. 318(k) is to attribute to Congress the enactment of an internally inconsistent interim mandatory health standard and an intention to leave operators completely in the dark as to the precise standard of care to which they would be held. It is not difficult to recognize the severe due process problems in terms of vagueness such an interpretation would pose, and we are unwilling to read the Act as if the Congress carelessly stuttered in giving notice of the legal benchmark of compliance, particularly since such an interpretation is not in any way compelled semantically.<sup>22</sup>

Third, even if we were to assume

<sup>22</sup> The 5-micron definition set forth in sec. 318(k) was not the product of a slip of the legislative draftsman's pen. The legislative history shows that the Congress was told by expert witnesses that the dangerous particulates insofar as health is concerned were those only 5 microns or less. Hearings Before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, Coal Mine Health and Safety, pp. 586-591, 860 (91st Cong., 1st Session). At page 591, the following quotation appears: "It must be borne in mind at all times that what we are interested in is the amount of 1-5 micron dust which the miner inhales over a working shift. It is important that, whatever the sampling and analysis procedure used, the results must be reliable and representative of average dust concentrations to which the miner is exposed over an extended period."

*arguendo* that sec. 318(k) can be "ignored," and further, that the pertinent interim standard of compliance was, as MESA suggests, 3.0 milligrams of respirable dust per cubic meter of air, respirable dust being defined as particulates up to the maximum size measured by the MRE (7 microns), MESA would still not prevail. To read the Act in the manner MESA urges in no way excuses the unexplained failure of the laboratory technicians to examine filters for oversize particulates when such filters show a net weight gain less than 6 milligrams.

We turn now to the separate argument of whether, in promulgating 30 CFR Part 74, the Secretary and the Secretary of Health, Education, and Welfare authorized MESA to ignore the 5-micron definition in section 318(k) and required MESA to cite operators under sec. 104(i) for exposure of miners to excessive average concentrations of respirable dust, respirable dust being defined as particulates up to the size measured by any sampler approved under 30 CFR Part 74, meaning in this case up to 10 microns in size. This argument is analytically distinct because, regardless of whether sec. 202(e) defines the term "respirable dust," there is no question that the Secretary and the Secretary of Health, Education, and Welfare could have "superseded" the interim mandatory health standard of 3.0 milligrams of respirable dust per cubic meter of air, respirable dust being defined by sec. 318(k) as particulates up to 5 microns in size, by promulgating an improved stand-

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ard under sections 101 and 201, 30 U.S.C. §§ 811, 841 (1970). The alleged "improvement" here could have been a redefinition of the term "respirable dust" to read "only particulates up to the size measured by any sampler approved under 30 CFR Part 74" rather than only dust particulates 5 microns or less in size. Such a redefinition would have constituted an improved mandatory health standard because excessive average concentrations of particulates of a *larger* size then would have been illegal. To put the matter another way, an operator then would have been required to control levels of particulates in the air of a size which had previously not been subject to regulation under the interim standard as interpreted by the Board today.

The initial difficulty with MESA's argument is that there is no language anywhere in 30 CFR Part 74 which can be read as saying that the applicable limit on concentrations of respirable dust is now 3.0 milligrams per cubic meter of air, respirable dust being *redefined* as particulates up to the size measured by any personal sampler unit approved under 30 CFR Part 74 which in this case is 10 microns. Indeed one of the tell-tale signs of the weakness of MESA's regulatory argument is its failure to point to the language of any provision of 30 CFR Part 74 to support its position.

In addition to the lack of essential direct semantical support in 30

CFR Part 74, there are two circumstantial legislative facts which clearly undermine MESA's argument.

The first of these facts is that the Secretary and the Secretary of Health, Education, and Welfare promulgated 30 CFR Part 74 under sec. 508 of the Act, 30 U.S.C. § 957 (1970). Section 508 is the residual grant of rulemaking power under the Act, and improvements in the mandatory standards cannot be validly promulgated under that section. Compare *United States v. Finley Coal Company*, 493 F.2d 285 (6th Cir.), *cert. denied*, 419 U.S. 1084 (1974) with *Zeigler Coal Company v. Kleppe*, 536 F.2d 398, (D.C. Cir., 1976). Improvements in mandatory standards, superseding or raising the interim standards set forth in the Act, must be promulgated under sec. 101. See 30 U.S.C. §§ 811, 841, 842(f) (1970). Inasmuch as the Secretary and the Secretary of Health, Education, and Welfare must be deemed to have known the proper procedure for promulgating improved mandatory standards and should not be deemed to have ignored such procedures, it follows that the promulgation of 30 CFR Part 74 under section 508 is circumstantial evidence that the Secretaries were neither authorizing MESA to ignore the interim standard nor improving upon it. To conclude otherwise would be virtually to admit that the Secretaries had invalidly promulgated 30 CFR Part

74, an admission which, under *United States v. Finley Coal Company, supra*, would foredoom any and all actions under sec. 109(a) (4) to collect assessments which might be ordered upon sec. 104(i) notices citing alleged respirable dust violations based on data produced by a sampler approved under 30 CFR Part 74. The Board was not constituted by the Secretary to indulge MESA in such a crippling construction of his regulations merely for the sake of concealing a MESA error in interpreting those regulations.

The second legislative fact circumstantially undermining MESA's argument with respect to 30 CFR Part 74 is the promulgation of 30 CFR 70.2(i) by the two Secretaries on *Apr. 3, 1970*, 35 FR 5544. That regulation, which is not mentioned in either of MESA's briefs in this case, provides as follows:

"Respirable dust" means only dust particulates 5 microns or less in size.

And if the above-quoted words seem somewhat familiar, the familiarity stems from the fact that 30 CFR 70.2(i) tracks sec. 318(k) word for word. The significance of 30 CFR 70.2(i) and the date of its promulgation for this case lie in a comparison to the promulgation date of 30 CFR Part 74. The latter was promulgated on *March 11, 1970*, 35 FR 4326, nearly 1 month prior to 30 CFR 70.2(i). To read 30 CFR Part 74, as does MESA, means in light of the chronology of events just detailed that, on Mar. 11, 1970, the Secretary and the Secretary of Health, Education,

and Welfare authorized MESA to "ignore" the 5-micron interim definition of the term "respirable dust" in sec. 318(k), and then on Apr. 3, 1970, inexplicably promulgated the words of sec. 318(k) as 30 CFR 70.2(i). Such a reading of these regulations attributes to both Secretaries an irrational inability to make up their minds whether the applicable limit on average concentrations should be 3.0 milligrams of respirable dust per cubic meter of air, respirable dust being defined open endedly as particulates up to whatever size is measured of any sampler approved under 30 CFR Part 74, or 3.0 milligrams of respirable dust per cubic meter of air, respirable dust being defined by 30 CFR 70.2(i) as only particulates 5 microns or less in size. We are not prepared to indulge MESA by adopting an interpretation of 30 CFR Part 74, unsupported by its literal language, which will leave the absurd impression that the Secretary and the Secretary of Health, Education, and Welfare indecisively promulgated and perpetuated *two* definitions of "respirable dust," thus leaving the industry without any clear notice as to the full extent of their legal obligations to suppress dust particulates in the mine atmosphere. We think that the promulgation of the words of sec. 318(k) as 30 CFR 70.2(i) circumstantially proves that the two Secretaries never intended to abandon the interim definition of "respirable dust," and in accordance with our delegated responsibility, we are, on behalf of the Secretary, holding MESA to the letter of the

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unambiguous provisions of that regulation.

Furthermore, we must point out that, given the precise duplication of sec. 318(k) in 30 CFR 70.2 (i), MESA's argument that it is free to "ignore" the former is necessarily a claim that it may ignore the latter. It almost goes without saying that no agent of the Executive Branch is at liberty to ignore its own regulations to the prejudice of the public, and further, that any sec. 109(a)(4) penalty collection action brought on a contrary theory would most likely be summarily dismissed, a result which would vitiate the deterrent effect and the effectiveness of the respirable dust enforcement system. See *United States v. Nixon*, 418 U.S. 683 (1974).

Finally, we note here, as we did similarly with respect to MESA's statutory argument, that even if we were to conclude that 30 CFR Part 74 displaced sec. 318(k), such conclusion would not account for MESA's admitted and unexplained failure to examine filters showing a net weight gain *less* than 6 milligrams for oversize particulates. In fact, the only legal authority cited by MESA which in any way supports this suspect practice is contained in MESA's final rationalization for its view that sec. 318(k) can be ignored. That rationalization, expressed impliedly by citations to MESA technical publications listed *supra* at page 434, appears to be that there has been a policy in MESA to ignore the provisions of sec. 318(k) and to act as if

the standard were 3.0 milligrams of respirable dust per cubic meter of air, respirable dust being defined as only particulates up to the size measured by any personal sampler approved under 30 CFR Part 74.

The technical publications, upon which MESA relies, describe the procedures for dealing with oversize particulates, but they neither explain nor rationalize that procedure on a scientific basis, and indeed one of them actually quotes 30 CFR 70.2(i). (See Respondent's Exhibit No. 9, p. 8.) The mere fact that MESA has ignored sec. 318(k) and its regulatory alter ego, and has acted as if the standard of care had been elevated is of course no justification for that practice and does not represent a policy of the Secretary, binding on us or the public, in derogation of the Act and regulations. See *Hall Coal Company, Inc.* 1 IBMA 175, 177-8, 79 I.D. 668, 1971-1973 OSHD par. 15,380 (1972). MESA is not a law unto itself, and has never been at liberty to act as if it were.

Having disposed of MESA's legal defenses, we can now sum up the record as follows: (1) by placing the subject notices in evidence, MESA established a *prima facie* case for its charges that Eastern had exceeded the applicable limit on average concentrations of "respirable dust,"<sup>23</sup> (2) Eastern estab-

<sup>23</sup> Eastern argued that proof on the issue of oversize particulates is a matter of *prima facie* evidence. In so contending, it was in error. That issue is a matter of affirmative defense. See *Castle Valley Mining Company, supra*, and *Armco Steel Corp.*, 2 IBMA 359, 80 I.D. 790, 1973-1974 OSHD par. 17,043 (1973).

lished by a preponderance of the evidence an affirmative defense—to wit, that each of the subject notices was based upon alleged concentrations of “respirable dust” that in fact included particulates of dust which are not “respirable” as a matter of law under section 318(k) of the Act and 30 CFR 70.2(i); and (3) MESA’s sole rebuttal, namely, that the provisions of sec. 318(k) were properly ignored as a matter of law, is without merit. On the basis of that record and those conclusions we are compelled on reconsideration to affirm the portion of Judge Moore’s order vacating the subject notices.

Before closing, however, we think that a word or two is in order regarding our role in the respirable dust program and the possible impact of this decision.

In adjudicating civil penalty cases involving alleged violations of the respirable dust mandatory health standards, we speak and act finally for the Secretary. 43 CFR 4.1. In so doing, it is our task to construe and apply the standards so that they make sense and so that he and the Secretary of Health, Education, and Welfare do not appear to have promulgated irrational and inconsistent policies by regulation. It is also our task in adjudicating these cases to see to it that individual MESA enforcement efforts have been by the regulations and that the Secretary has a solid evidentiary basis for a collection action under sec. 109(a)(4) based on any assessment of civil

penalty which might be ordered pursuant to sec. 109(a)(3). 30 U.S.C. § 819(a)(3), (a)(4) (1970). It is our judgment that the legal theory advanced by MESA in this case, namely, that a portion of the Act and regulations can be ignored, cannot withstand analysis by anyone other than a determined apologist for MESA. It is also our view that the evidentiary basis for the subject notices, even when viewed in the most favorable light, is thin to nonexistent on the question of oversize particulates. Were we to turn a blind eye to the manifest deficiencies in MESA’s presentation, we would betray the trust placed in the Board by the Secretary and the promise of effective relief implicit in the legislative creation of administrative remedies. Moreover, were we to duck the real issues explored above by persisting obstinately in the mistaken view that the problem here is a challenge to the regulations rather than a challenge to MESA’s construction of the Act and regulations, we would pass on to the federal courts a problem which can and should be resolved at the administrative level.

Naturally, we are concerned about the impact of our decision on sec. 104(i) notices of violation and orders of withdrawal pertaining to alleged violations of respirable dust mandatory standards which are still in litigation or which will be issued in the future. Because of the weakness of MESA’s evidentiary presentation and legal theory, it is difficult to gauge the impact that

(ON RECONSIDERATION)

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today's decision is likely to have. In large measure, of course, the impact may be determined by alternative arguments not presented in this case and upon which we ought not to speculate since our function is strictly adjudicative. We are *not* here to provide MESA with legal theories to sustain its petitions for assessment of civil penalty. See *National Realty and Construction Co., Inc. v. OSHRC.*, *supra*, at n. 5. However, if there are no alternative, persuasive arguments, then many sec. 104(i) citations may have to be vacated and the Secretary and the Secretary of Health, Education, and Welfare may have to engage in rulemaking. As to the former prospect, we have few qualms. This case is no different than *Hall Coal Company*, *supra*, where we struck down a notice of violation, finding a failure to comply with the incombustible content requirements of sec. 304(d) of the Act, 30 U.S.C. § 864(d) (1970), because MESA presented no laboratory analyses and was content to rest its case purely on the visual observations of the issuing inspector. *Hall* led to the vacating of many notices, results which were salutary because any sec. 109(a)(4) collection actions based on such notices would have been foredoomed. If MESA's presentation in this case is the sum total of its position, then the vacating of sec. 104(i) notices or orders in the future based on today's decision is a positive good because, as with the *Hall* decision,

cases upon which the Secretary could not possibly prevail will have been resolved in the Department without bothering busy federal district courts and United States attorneys who should not be required to deal with cases that are candidates for adverse summary judgment. As to the prospect that we may be inducing rulemaking, we can only say that in our opinion a proceeding for that purpose is strongly to be desired. When Congress enacted the interim mandatory health standards, it was well aware that the Secretary and the Secretary of Health, Education, and Welfare might need to make far reaching alterations of the interim respirable dust system in the light of technological reality and advancing research, and as we indicated above, the two Secretaries have already done so, *supra* at 431. In holding MESA to the letter of sec. 318 (k) and 30 CFR 70.2(i), we may have revealed the necessity to amend the definition of the term respirable dust." If there is such a necessity, early discovery here is a happy event. In a more general vein, the convening of a rulemaking proceeding to deal with that definition might provide the occasion to deal with other alleged defects, some of which have been encased in regulatory concrete and are thus beyond our subject matter jurisdiction. Painful as it may be to admit that there are fatal defects in the existing system, it would be irresponsible and unconscionable to

hide stubbornly behind the regulations awaiting invalidation by a federal court. Both the miners and industry deserve better.

### ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that, upon reconsideration, with respect to Appeal No. IBMA 75-23 and Notice of Violation No. 4 SBP (Mar. 3, 1972), our initial decision IS SET ASIDE in pertinent part, and such notice IS VACATED and the order below assessing a civil penalty based thereon IS SET ASIDE.

IT IS FURTHER ORDERED that, upon reconsideration, with respect to Appeal No. IBMA 75-25, our decision of Sept. 30, 1975, and the subsequent decision below on remand ARE SET ASIDE, and the initial decision below vacating the subject 22 notices of violation IS AFFIRMED.

DAVID DOANE,  
*Chief Administrative Judge.*

I CONCUR:

DAVID TORBETT,  
*Alternate Administrative Judge.*

ADMINISTRATIVE JUDGE  
SCHELLENBERG  
DISSENTING:

Today's decision by my colleagues on the Board destroys the integrity of, and renders a nullity, the respi-

rable dust provisions of the Federal Coal Mine Health and Safety Act of 1969. In addition to vacating every previously issued notice of violation, this decision makes future notices an improbability.

We have today violated the intent of Congress and made any enforcement of the program an improbability at best.

I am unable to find that the argument of the operator is other than attack upon not only the regulations and/or procedures established by the Secretary but the statutory scheme itself. This Board has consistently held that such attacks are not litigable in an adjudicative proceeding but are properly the subject of a rulemaking proceeding or legislation.

The majority opinion rests solely on the definition of the term "respirable dust" found in sec. 318(k) of the Act and incorporated in sec. 70.2(i) of the regulations. This reliance fails to give adequate consideration to the more operative secs. of the Act, 202 (e) and (f) as follows:

(e) References to concentrations of respirable dust in this title means the average concentration of respirable dust if measured with an MRE instrument or such equivalent concentrations if measured with another device approved by the Secretary and the Secretary of Health, Education, and Welfare. As used in this title, the term "MRE instrument" means the gravimetric dust sampler with four channel horizontal elutriator developed by the Mining Research Establishment of the National Coal Board, London, England.

(f) For purposes of this title, the term "average concentration" means a determination which accurately represents the

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*atmospheric conditions with regard to respirable dust* to which each miner in the active workings of a mine is exposed \* \* \*. [Italics added.]

There is a big difference between the definition of "respirable dust" and the measurement of the "average concentration," a distinction apparently overlooked by my colleagues.

Since Congress expressly authorized and mandated that the "average concentration" of respirable dust be *measured* with an MRE instrument it necessarily follows that it approved the measurement of dust particles of up to 7 microns in size since this is the established limit of capability of such instrument. Furthermore, Congress granted to the Secretary and the Secretary of HEW the authority to approve "another device" with which to measure equivalent concentrations. The device so approved by both Secretaries is a battery-operated personal respirable dust sampler. This sampler has an established capability limit of up to 10 microns. Pursuant to sec. 70.206 the concentration of respirable dust measured with a personal sampler unit "shall be multiplied by a constant factor of 1.6 and the product shall be the *"equivalent concentration as measured with an MRE instrument."*

It is clear to me that this section is a recognition of the difference in the dust recovery characteristics of the MRE and the personal sampler unit and provides for a compensating factor in determining the "aver-

*age concentration or respirable dust"* to account for such difference.

As far as I can see, neither the Congress, the respective Secretaries, the scientific community, nor, most importantly, the industry was, or is, cognizant of any dust measuring device which excludes all dust particles in excess of 5 microns in size.

I further emphasize that the Act, sec. 202(a), places upon the operator the responsibility for taking "accurate samples of the amount of respirable dust in the mine atmosphere to which each miner in the active workings of such mine is exposed." The Secretary's responsibility pursuant to the same section is to provide a method of transmission of samples, and to analyze and record the results. In net effect the Secretary's responsibility is to ensure that the samples taken by the operator are analyzed in an atmosphere free of outside contamination. I find nothing in the Act requiring the Secretary to further refine individual dust samples taken by the operator as suggested by the majority nor am I sure such a scientific procedure exists. It appears to me, since no instrument currently exists which is capable of filtering out dust particles in excess of 5 microns in size, that all samples presently being submitted for weighing automatically must be considered contaminated and invalid.

In my opinion the Secretaries of the Interior and HEW are precisely following the intent of the Con-

gress in the collection of samples and the measurement thereof. I arrive at this conclusion after a review of the testimony of numerous persons before the Subcommittee on Labor of the Committee on Labor and Public Welfare, of the United States Senate as well as similar testimony before the General Subcommittee on Labor of the Committee on Education and Labor of the House of Representatives.<sup>1</sup>

<sup>1</sup>Testimony concerning measurement of Respirable Dust before Senate Committee:

1. James R. Garvey, VP National Coal Assn., Pres. of Bituminous Coal Research, Inc., p. 571-593; 2. Dr. I. E. Buff, Chairman, Committee of Physicians for Miners' Health and Safety, Charleston, W. Va., p. 625-653; 3. Louis E. Kerr, M.D., Asst. to Exec. Med. Officer of UMWA Welfare & Retirement Fund, p. 677-694; 4. Dr. William H. Stewart, Surgeon General, PHS, p. 722-743; 5. Dr. Ian Higgins, School of Public Health, U. of Mich., including resumed Statement of Dr. Murray B. Hunter, Fairmont Clinic, Fairmont, W. Va., p. 852-853; 6. Dr. Leon Cander, Chairman, Dept. of Medicine, U. of Texas Medical School, p. 860-865; 7. Prof. Jethro Gough, Professor & Head, Dept. of Pathology, Welsh Nat'l School of Medicine, p. 1027-1030; 8. Dust Concentrations in Bituminous Coal Mines (Survey conducted by U.S. Bureau of Mines), p. 1314-1328.

It is clear to me that Congress in setting the 3.0 mg/m<sup>3</sup> and 2.0 mg/m<sup>3</sup> standards was fully aware that such standards related to the collection characteristics of the MRE.

In sum I conclude that Congress authorized the collection and analysis of dust samples to a size of 7 microns and the respective Secretaries, pursuant to Statutory authority, have approved a personal sampler unit which, with the conversion factor, measures the average concentration of respirable dust to which miners are exposed in conformance with Congressional intent.

The attack here is upon the statutory and regulatory system in general and as such is not proper in an adjudicative proceeding.

I respectfully dissent and would affirm the Board's original decision in this proceeding.

HOWARD J. SCHELLENBERG, Jr.,  
*Administrative Judge.*

*February 25, 1975*

# APPEAL OF PIRATE'S COVE MARINA\*

IBCA-1018-2-74

*Decided February 25, 1975*

Contract No. 14-16-003-13, 448,  
Crab Orchard National Wildlife  
Refuge, Fish and Wildlife Service.

Dismissed and Remanded.

## 1. Contracts: Disputes and Remedies: Jurisdiction—Rules of Practice: Ap- peals: Dismissal

An appeal by a concessionaire at a wild-  
life refuge who alleges that Government  
harassment of the public, failure to re-  
pair roads and other actions resulted in  
a decrease of business and who seeks  
therefor to be relieved of payment of a  
semi-annual franchise fee of 3 percent of  
gross receipts required under the conces-  
sion agreement and given the right to  
sell beer, *inter alia*, is dismissed for lack  
of jurisdiction, since the agreement con-  
tains no adjustment provisions and the  
relief requested entails reformation of  
the agreement, but is remanded to the  
contracting officer, who has wide discre-  
tion under the agreement to provide  
relief, for further consideration in the  
light of the Board's opinion.

**APPEARANCES:** Mr. John H. Hays,  
Pirate's Cove Marina, Carbondale, Illi-  
nois, for the appellant; Mr. Elmer T.  
Nitzschke, Jr., Department Counsel,  
Twin Cities, Minnesota, for the  
Government.

## OPINION BY ADMINISTRA- TIVE JUDGE KIMBALL INTERIOR BOARD OF CONTRACT APPEALS

This appeal arose as a result of a  
concession agreement under which

the appellant was authorized to  
provide certain accommodations,  
facilities and services for the public  
at Crab Orchard Dock No. 2,  
located on Crab Orchard Lake in  
Crab Orchard National Wildlife  
Refuge, for a 10-year term com-  
mencing Apr. 1, 1971. In turn, the  
appellant was required by sec. 6 of  
the agreement to pay \$500 annually  
and a franchise fee of three percent  
of its gross receipts to the Govern-  
ment within 90 days after June 30  
and Dec. 31 of each year. The appel-  
lant contends that Government in-  
terference and restrictions have  
made its operations unprofitable  
and impaired its ability to pay. For  
this reason, it requests that it be  
relieved of liability for future pay-  
ments "until such time [as] Pirate's  
Cove can show a sufficient profit to  
warrant payment of the 3%"<sup>1</sup> and  
it seeks a return of those payments  
made by it in 1972 and 1973.

In the contracting officer's deci-  
sion which precipitated this  
appeal,<sup>2</sup> he determined that the  
Government was not responsible  
for appellant's financial difficulties.  
Consequently, he refused either to  
refund previous franchise fee pay-  
ments or to waive future payments.  
He found that the appellant was in  
default for failing to pay the fee for  
the period from January 1 to  
June 30, 1973, and thereafter issued

<sup>1</sup> Appellant's complaint, dated Mar. 13, 1974.

<sup>2</sup> Decision of the Contracting Officer, dated  
Dec. 27, 1973 (Exh. No. 2). All exhibits  
referred to are contained in the appeal file.

\*Not in Chronological Order.

a notice of termination of the concession arrangement under sec. 12.<sup>3</sup>

Although appellant's nonpayment is the cornerstone of the contracting officer's decision, the questions presented to us go well beyond that of default-excusableity. We are called upon to remedy certain alleged wrongs. The appellant seeks through this appeal to improve the business climate for its concession. It wants us to require the Government to promote increased usage of Crab Orchard Lake specifically by such means as restoring electrical outlets at an adjoining campground, raising the water level of the lake, reopening beaches and recreational areas, permitting the sale of beer, installation of a miniature golf course, and the use of musical entertainment, by improved maintenance of the roads and by lessening "too much Federal control" and "harassment" of the public. The appellant also seeks to prevent a nearby concessionaire from competing with it in the sale of similar items.

[1] The appellant ascribes to the Board an inherent authority we do not have. We cannot compel the Government to restore electrical outlets at the campground, or to raise the water level of the lake, or

to reopen beaches, or to install a miniature golf course. Sec. 19 of the agreement, pursuant to which this appeal was taken, is the usual Disputes clause found in Standard Form 32 and, standing alone, does not constitute an avenue of relief.<sup>4</sup> Unless an agreement before us makes provision for some adjustment, we are powerless to act.<sup>5</sup> The contract under review is devoid of such terms as are usually found in a standard procurement contract. The agreement has provided a right without a remedy.

The concession agreement makes no exception to the payment of the gross receipts fee. It specifically prohibits the sale of alcoholic beverages. It makes clear that the primary purpose of Crab Orchard is the wildlife refuge and that the concession arrangement and other recreational aspects play only a subordinate role there.<sup>6</sup> It does not

<sup>4</sup> See *Toke Cleaners*, IBCA-1008-10-73 (May 10, 1974), 81 I.D. 258, 74-1 BCA par. 10,633; and *Placer County, California*, IBCA-777-5-69 (Apr. 8 1971), 78 I.D. 113, 133, 71-1 BCA par. 8801, at 40,890 in which the Board said, "The inclusion of a Disputes clause in a contract does not convert what would otherwise be a claim for breach of contract \* \* \* into a claim under the contract."

<sup>5</sup> *Id.*

<sup>6</sup> Sec. 19 provides:

"General Provisions—(a) The concessioner agrees that the concession area is at all times subject to the dominant use and regulation by the Secretary in his control and conservation of fish and wildlife and the Concessioner shall not do or suffer to be done \* \* \* any act intended to interfere with the Secretary's control over the same. The Concessioner specifically waives any and all claims for damage resulting from activities of the Secretary or his representatives or employees in connection

<sup>3</sup> A notice of termination dated Feb. 12, 1974 (Exh. No. 3), was canceled by notice dated Feb. 26, 1974 (Exh. No. 14), following payment by the appellant of the fee for the period Jan. 1-June 30, 1973. Subsequently, the contracting officer issued a notice of termination, dated Dec. 24, 1974 (which is hereby added to the appeal file as Exh. No. 15), for nonpayment of the fee for the period between Jan. 1 and June 30, 1974, and for failure to furnish a performance bond as required by sec. 8 of the agreement.

give the appellant an exclusive concession.

What the appellant has asked us to do entails rewriting the agreement to provide more favorable terms. This we cannot do. Reformation of a contract has long been considered beyond a board's jurisdiction.<sup>7</sup>

With respect to the franchise fee, from time to time some contract provisions have been held to be unconscionable by virtue of the Uniform Commercial Code and therefore unenforceable.<sup>8</sup> The appellant has not made any such allegation and we perceive no basis for so finding on the record before us. A fee equal to three percent of a concessionaire's gross receipts does not appear unreasonable, even though, from the appellant's point of view, it may have been more equitable, as it has urged, if payment of the franchise fee had been made contingent on some minimum earnings, or had been graduated.

with the program of fish and wildlife conservation and protection. \* \* \*

Recitals at the beginning of the agreement read:

"THAT WHEREAS, the Crab Orchard National Wildlife Refuge \* \* \* has been established for the management, protection and conservation of migratory birds and other wildlife; and

"WHEREAS, it is the purpose of the Secretary to facilitate enjoyment by the general public of the recreational opportunities in the area to an extent consistent and compatible with the primary purpose of the refuge \* \* \*." (Italics supplied)

<sup>7</sup> *Angus Park Woolen Company, Inc.*, ASBCA No. 18827 (Oct. 24, 1974), 74-2 BCA par. 10,924, at 51,982; *Kasper Brothers*, GSEBCA No. 4016 (July 17, 1974), 74-2 BCA par. 10,753, at 51,130.

<sup>8</sup> See *REDM Corporation*, ASBCA No. 17378 (June 29, 1973), 73-2 BCA par. 10,167, at 47,868.

The appellant has not established the extent of the financial loss it claims to have sustained. According to the appellant, its gross receipts decreased from \$178,000 in 1971, to \$146,000 in 1972, and dropped further to \$99,611.59 in 1973,<sup>9</sup> but a decrease in receipts does not necessarily result in an unprofitable operation. The agreement does not guarantee the appellant against loss, nor does it guarantee it a profit. Under sec. 5 of the agreement the rates and prices charged are subject to the approval of the contracting officer, "with due regard for the right of the Concessioner to realize a fair profit from the concession operation." There is no indication that the appellant sought to raise its prices or that the Government refused to permit an increase.

The contracting officer determined that the financial difficulties which allegedly ensued are not the responsibility of the Government. By Sec. 1 of the agreement the contracting officer is given wide discretion to relieve the concessionaire "in whole or in part of any or all of [its] obligations for such \* \* \* periods as" he deems "proper" upon a showing of "circumstances beyond the control of" the concessionaire "warranting such relief and upon a determination" by him "that such action is in the interest of the United States." In the absence of a

<sup>9</sup> Transcript of hearing held by contracting officer on Dec. 13, 1973, in connection with appellant's claim, p. 1 (Exh. No. 6). The transcript filed was unpaginated and has since been paginated by the Board.

clear showing of flagrant abuse, we may not look behind his failure to exercise his discretion in favor of the appellant.<sup>10</sup> We may not substitute our judgment for his.

From our examination of the record a question arises whether the Government fully met its duty to make road repairs under sec. 4(e) of the agreement, but no causal connection between inadequate repairs and the decrease in gross receipts has been demonstrated. The evidence presented is insufficient to hold that a breach actually occurred. Even if it were sufficient, however, the appellant must look elsewhere for redress.

The appellant may have lost sight of the fact that at Crab Orchard the Government's primary concern is conservation of fish and wildlife. Whatever swimming, boating and other recreational activities occur there are expected to be compatible with a wildlife refuge.<sup>11</sup> Whether the Government went beyond its legitimate interest and acted unreasonably is outside the power of this Board to determine.

It has been said, as a general proposition, that implicit in a contract is a duty by a party through its acts not to make performance by the other party more expensive and thus less profitable. The Court of Claims failed to find an implied

condition not to hinder performance was present where a hunting lodge operator had a concession to run a lodge in a wildlife refuge and the Government reduced the length of the hunting season.<sup>12</sup> Nevertheless, it seems to us that undue Government interference and unnecessarily harsh enforcement of restrictions, of the nature alleged, which can be shown to have caused the appellant's operations to be unprofitable, might constitute a breach of such an implied duty, although beyond our jurisdiction to remedy.<sup>13</sup> In our view, the blanket waiver of claims for damages resulting from Government conservation activities, contained in sec. 19,<sup>14</sup> does not preclude the appellant from pursuing such a claim in the proper forum.

We are unable to provide the appellant any relief to which it may be entitled. In the absence of an enumeration of acceptable excuses for default in sec. 12, the Termination for Default clause, we are powerless to hold that any of the circumstances relied upon by the appellant constitutes sufficient excuse for its default in paying the franchise fee. Accordingly, the appeal is dismissed and remanded to the con-

<sup>10</sup> See *Thomas W. Yoder Company, Inc.*, VACAB No. 997 (Jan. 25, 1974), 74-1 BCA par. 10,424; *Norair Engineering Corporation*, GSBCE No. 3589 (Mar. 21, 1973), 73-1 BCA par. 9975.

<sup>11</sup> Note 9, *supra*, at 12.

<sup>12</sup> *McGuire v. United States*, 158 Ct. Cl. 285 (1962). See also, *Air Terminal Services, Inc. v. United States*, 165 Ct. Cl. 525, 533-34 (1964), *cert. denied*, 379 U.S. 829 (1964).

<sup>13</sup> *General Motors Corporation, AC Spark Plug Division*, ASBCA Nos. 14414-15 (Aug. 24, 1970), 70-2 BCA par. 8446.

<sup>14</sup> See note 6, *supra*.

tracting officer for further consideration in the light of this opinion.<sup>15</sup>

SHERMAN P. KIMBALL,  
*Administrative Judge.*

I CONCUR:

WILLIAM F. MCGRAW,  
*Chief Administrative Judge.*

APPEAL OF THEODORA M.  
WITHAM\*

1 ANCAB 20

Decided *December 29, 1975*

Appeal from the Decision of the Alaska State Director, Bureau of Land Management, #AA-9037, rejecting an application for primary place of residence under sec. 14(h)(5) of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1624 (Supp. II, 1972).

Decision of the Bureau of Land Management #AA-9037, dated July 29, 1974, affirmed Dec. 29, 1975.

1. Alaska: Land Grants and Selections: Generally—Alaska Native Claims Settlement Act: Primary Place of Residence: Filing Deadline: Waiver

Sec. 14(h)(5) of the Alaska Native Claims Settlement Act establishes a mandatory deadline for applications for a primary place of residence, which may

<sup>15</sup> See *James Know dba JaK Enterprises, IBCA-684-11-67* (Feb. 13, 1968), 68-1 BCA par. 6854, in which we stated that the contracting officer's authority in the area of breach of contract claims exceeds that of the Board.

\*Not in Chronological Order.

not be waived in the exercise of Secretarial discretion.

APPEARANCES: William H. Babcock, Esq., on behalf of Theodora M. Witham and John W. Burke, Esq., Office of the Regional Solicitor, on behalf of Bureau of Land Management.

OPINION BY CHAIRMAN  
BRADY

ALASKA NATIVE CLAIMS  
APPEAL BOARD

The Alaska Native Claims Appeal Board, pursuant to delegation of authority in the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1624 (Supp. II, 1972), and the implementing regulations in 43 CFR Part 2650 and Part 4, Subpart J, hereby makes the following findings, conclusions, and decision affirming the decision of the State Director, Bureau of Land Management, # AA-9037 (hereinafter referred to as the State Director).

Pursuant to regulations in 43 CFR Part 2650, the State Director is the officer of the United States Department of the Interior who is authorized to make final decisions on behalf of the Secretary on land selections under the Alaska Native Claims Settlement Act, subject to appeal to this Board.

On July 29, 1974, the State Director issued a decision rejecting the application of Theodora M. Witham for a primary place of residence under sec. 14(h)(5) of the

Alaska Native Claims Settlement Act. The decision stated, in pertinent part:

On July 13, 1974, Theodora M. Witham filed an application for a primary place of residence under sec. 14(h) (5) of the Alaska Native Claims Settlement Act of Dec. 18, 1971 (85 Stat. 688).

Sec. 14(h) (5) of the Act states in part:

The Secretary may convey to a Native, upon application within two years from the date of enactment of this Act \* \* \* 160 acres of land \* \* \*. Determination of occupancy shall be made by the Secretary, whose decision shall be final. \* \* \* (Italics added).

Ms. Witham did not file her application within the time period specified in the act. Therefore, Mrs. Witham's application must be, and is hereby, rejected.

The appeal filed on behalf of Theodora M. Witham agrees that the application for a primary place of residence was not filed prior to the two year deadline specified in the Act but argues that the deadline should be waived based upon the Witham's long residence on the property, the improvements they have made, and their lack of knowledge of the two year deadline in the Claims Act.

The following excerpts from the documents filed by Mr. William H. Babcock, attorney for the Withams, is representative of their position.

In the case of Mrs. Witham, we have a person who was not aware of these provisions of the Act, and who had made repeated annual requests of the Forest Service for the right to acquire [sic] permanent possession of the land upon which she, her husband and her children have been living for many years. It seems to us imminently unfair that, because she

was not aware of the provisions of this act, as someone would have been in the city, she would be deprived of her rights under the act. I would like to point out that Port Alexander, where the Withams live, is an isolated, sparsely settled community over 100 miles from Sitka with no communication except by boat and plane, and that communication normally being very spotty. Mrs. Witham is the only Native among the 30 people who are the usual residents of Port Alexander.—Letter dated June 11, 1974, to the Bureau of Land Management from William H. Babcock.

I know from my own knowledge, that the Withams had repeatedly attempted to buy the land from the Forest Service, or have some kind of ownership of the land, other than that which they have, which appears to be sort of a year to year lease at will and at the sufferance of the Government. The Withams, to my knowledge, have improved the land where they live, they have a nice home on the lot and have lived there since 1963. Although it is isolated, I have visited it on occasion. They are raising a fine family in Port Alexander and it would really appear that in all equity and good faith, the appellant's request to waive the two year period, be granted.—Supplemental Documentation In Support of Appeal, filed Oct. 6, 1975.

[1] Sec. 14(h) (5) of the Alaska Native Claims Settlement Act, provides:

(5) The Secretary may convey to a Native, upon application within two years from the date of enactment of this Act [Dec. 18, 1971], the surface estate is not to exceed 160 acres of land occupied by the Native as a primary place of residence on August 31, 1971. Determination of occupancy shall be made by the Secretary, whose decision shall be final. The subsurface estate in such lands shall be conveyed to the appropriate Regional Corporations;

The regulations in 43 CFR Part 2650 provide:

§ 2653.4 Termination of selection period.

Applications for selections under this subpart will be rejected after all allocated lands, as provided in § 2653.1, have been exhausted, or if the application is received after the following dates, whichever occurs first:

(a) As to primary place of residence—  
December 18, 1973.

\* \* \* \* \*

§ 2653.8 Primary place of residence.

(a) An application under this subpart may be made by a Native who occupied land as a primary place of residence on August 31, 1971.

(b) Applications for a primary place of residence must be filed not later than December 18, 1973.

Since the Act and the regulations require that applications for a primary place of residence be rejected if not filed prior to Dec. 18, 1973, the application of Theodora M. Witham filed on June 13, 1974, was properly rejected. And, it appears that the appellant's request for a waiver of the statutory deadline must also be denied.

The regulations in 43 CFR Part 2650 provide:

§ 2650.0-8 Waiver.

The Secretary may, in his discretion, waive any nonstatutory requirement of these regulations. When the rights of third parties will not be impaired, and when rapid, certain settlement of the claims of Natives will be assisted, minor procedural and technical errors should be waived.

We can assume that equity would be served in some cases if the Secretary were vested with authority to waive the two year filing dead-

line for primary place of residence applications. Assuming the truth of Mrs. Witham's allegations in this case that she has occupied the lot claimed as a primary place of residence continually since 1963, that she has improved the property, and that she has a "nice home on the lot" and is raising a family there, it appears that her occupancy is of the type contemplated by sec. 14(h) (5) of the Act and that her claim may deserve relief. However, the regulations permit the waiver of only "nonstatutory requirements." Since the two year deadline for filing primary place of residence applications is expressly stated in sec. 14(h) (5) of the Act, it is not within the Secretary's waiver authority under this section.

No opinion is expressed on the other defects alleged in Mrs. Witham's application in view of the conclusive nature of the two year statutory deadline.

Therefore, the appeal of Theodora M. Witham, from Bureau of Land Management decision #AA-9037, dated July 29, 1974, is dismissed, and the decision of the Bureau of Land Management is affirmed.

JUDITH M. BRADY,  
*Chairman.*

WE CONCUR:

LAWRENCE MATSON,  
*Member of the Board.*

ABIGAIL F. DUNNING,  
*Member of the Board.*

# APPEAL OF JOE KLIMAS\*

1 ANCAB 26

Decided *April 23, 1976*

Appeal from the Decision of the Alaska State Director, Bureau of Land Management #AA-8609, rejecting an application for a primary place of residence under sec. 14(h) (5) of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1624 (Supp. II, 1972).

Decision of the Bureau of Land Management #AA-8609, dated May 17, 1974, affirmed Apr. 14, 1976.

1. Alaska Native Claims Settlement Act: Primary Place of Residence: Intent to reside without evidence of actual residence is insufficient to establish claim to land as a primary place of residence.

Sec. 14(h) (5) and 43 CFR 2653.0-5 of the Alaska Native Claims Settlement Act require that land applied for as a primary place of residence be occupied by the applicant as a primary place of residence on Aug. 31, 1971. "Primary place of residence" as contemplated by 43 CFR 2653.0-5(d) means a place comprising a primary place of residence of an applicant on Aug. 31, 1971, at which he regularly resides on a permanent or seasonal basis for a substantial period of time.

APPEARANCES: Regional Solicitor on behalf of State Director, Bureau of Land Management, Alaska Region.

OPINION BY CHAIRMAN  
BRADY

ALASKA NATIVE CLAIMS  
APPEAL BOARD

The Alaska Native Claims Appeal Board, pursuant to delegation

of authority in the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1624 (Supp. II, 1972), and the implementing regulations in 43 CFR Part 2650 and Part 4, Subpart J, hereby makes the following findings, conclusions, and decision, affirming the decision of the State Director, Bureau of Land Management #AA-8609 (hereinafter referred to as the State Director).

Joe Klimas appeals from the May 17, 1974, decision of the Alaska State Director, Bureau of Land Management rejecting his primary place of residence application #AA-8609.

Sec. 14(h) (5) of the Act states:

The Secretary may convey to a Native \* \* \* the surface estate \* \* \* of land occupied by the Native as a primary place of residence on Aug. 31, 1971. Determination of occupancy shall be made by the Secretary, whose decision shall be final. \* \* \*

Mr. Klimas certifies on his application that he did not have a primary place of residence on the tract on Aug. 31, 1971.

In two letters to the Board, dated July 8, 1975 and Dec. 23, 1975, Mr. Klimas asserts that while he has never "located" the land, the land is private property "given to his family by the Russians and described to him by his grandfather." He further asserts that such property is protected by the Treaty of Cession, and states his intent to build a home on the land "in about 2 more years."

\* \* \* back in the days after the Russians had been here awhile \* \* \* members of my family \* \* \* agreed to serve

\*Not in Chronological Order.

the Russians for a specified length of time for the land. And during this length of time, all of the family were lost in various ways, there was only one survivor, a man. The agreement was kept \* \* \* that this area of land should be the private land of the family according to the Russian system.

(Dec. 23, 1975, letter to ANCAB).

Now my grandfather had no legal description of the land as this only came later after the Americans were here awhile. But he did say about where it was, he said that as you were facing toward the Village of Chenega from the beach, that went around the point to your right hand side, that is of the person facing the village, and there was a small cove, with a beach and the stream came to the cove, and that the stream came from a lake.

I don't feel I would have any trouble finding it. In about 2 more years I am going to locate the land in question and build a home for myself just about where my grandfather's home was \* \* \*.

(July 8, 1975, letter to ANCAB)

Therefore, since the land applied for was not occupied as a primary place of residence on Aug. 31, 1971, Mr. Klimas' application must be and is hereby rejected.

Mr. Klimas' application is also deficient for the following reasons:

1. No map accompanied the application, as required, and the narrative description was insufficient to identify the lands applied for. (*See* 43 CFR 2650.2(e).)

2. The application was not accompanied by evidence of regional concurrence. (*See* 43 CFR 2653.2(b).)

3. No improvements were listed on the application. A dwelling is required on the tract to qualify for

a primary place of residence. (*See* 43 CFR 2653.8-2(b)(1).)

Neither the Notice of Appeal, filed with the Board by appellant Joe Klimas on June 13, 1974, nor the Statement of Reasons, filed on Dec. 23, 1975, rebut the decision of Alaska State Director, nor do they contain any pertinent information additional to that contained in appellant's original application for a primary place of residence.

Section 14(h)(5) of the Alaska Native Claims Settlement Act states in part:

The Secretary may convey to a Native, upon application within two years from the date of enactment of this Act, the surface estate is not to exceed 160 acres of land occupied by the Native as a primary place of residence on Aug. 31, 1971. \* \* \*

43 CFR § 2653.0-5, Definitions, states in part:

(d) "Primary place of residence" means a place comprising a primary place of residence of an applicant on Aug. 31, 1971, at which he regularly resides on a permanent or seasonal basis for a substantial period of time.

[1] Because the statute and regulations require that the land applied for as a primary place of residence must be the primary place of residence of the applicant on Aug. 31, 1971, and because the appellant certified in Part 3(b)(1) of his application that he did not have a primary place of residence on the applied for tract on such date, the appellant's application dated Dec. 13, 1973, was properly rejected.

Therefore, the appeal of Joe Klimas, from Bureau of Land Management decision #AA-8609, dated June 13, 1974, is dismissed, and the Decision of the Bureau of Land Management hereby affirmed.

JUDITH M. BRADY,  
*Chairman.*

WE CONCUR:

LAWRENCE MATSON,  
*Member of the Board.*

ABIGAIL F. DUNNING,  
*Member of the Board.*

# APPEAL OF ENGLISH BAY CORPORATION\*

1 ANCAB 35

Decided *June 4, 1976*

Appeal from the Decision of the Alaska State Director, Bureau of Land Management #AA-6664-B, dated Aug. 29, 1975, rejecting a land selection application of English Bay Corporation, under secs. 11 and 12 of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1624 (Supp. IV, 1974) as amended, 89 Stat. 1145 (1976).

Decision of the Bureau of Land Management #AA-6664-B, dated Aug. 29, 1975, affirmed June 4, 1976.

1. Alaska Native Claims Settlement Act: Land Selections: Withdrawals—

\*Not in Chronological Order.

Alaska Native Claims Settlement Act: Withdrawals: Deficiency

Lands located outside of sec. 11(a)(1) withdrawal area for a Native Village Corporation can only be withdrawn for selection pursuant to provisions of sec. 11(a)(3)(A) of ANCSA.

2. Alaska Native Claims Settlement Act: Withdrawals: Generally—  
Alaska Native Claims Settlement Act: Land Selections: Generally

Selection of lands by Native Village Corporations pursuant to provisions of sec. 12(a) of ANCSA is not permitted outside of lands withdrawn by provisions of sec. 11(a)(1) as they relate to the location of the selecting village.

3. Alaska Native Claims Settlement Act: Land Selections: Generally—  
Alaska Native Claims Settlement Act: Waiver

Failing to select land available within its sec. 11(a)(1) withdrawal, a Native Village Corporation cannot by giving consent and waiver to another Native Village Corporation make said lands available for selection under provision of sec. 12(a) of ANCSA.

APPEARANCES: John W. Burke, Esq., Office of the Regional Solicitor, on behalf of State Director, Bureau of Land Management; Jeffrey B. Lowenfels, Esq., Assistant Attorney General, State of Alaska; Joe P. Josephson, Esq., on behalf of English Bay Corporation.

OPINION BY CHAIRMAN  
BRADY

ALASKA NATIVE CLAIMS  
APPEAL BOARD

The Alaska Native Claims Appeal Board, pursuant to delegation

June 4, 1976

of authority in the Alaska Native Claims Settlement Act, *as amended*, 43 U.S.C. §§ 1601-1624 (Supp. IV, 1974), and implementing regulations in 43 CFR Part 2650 and Part 4, Subpart J, hereby makes the following findings, conclusions and decision, affirming the decision of the State Director, Bureau of Land Management #AA-6664-B (hereinafter referred to as the State Director).

Pursuant to regulations in 43 CFR Part 2650, the State Director is the officer of the United States Department of the Interior who is authorized to make final decisions on behalf of the Secretary on land selections under the Alaska Native Claims Settlement Act, subject to appeal to this Board.

On Aug. 29, 1975, the State Director issued a decision rejecting as unavailable for selection by English Bay Corporation, lands described in T. 12 S., Rs. 14 and 15 W., Seward Meridian. The decision recites that on Nov. 15, 1974, by Village Selection Application #AA-6664 filed Nov. 15, 1974, and amendment filed Oct. 10, 1975, English Bay Corporation selected lands situated within both T. 12 S., R. 14 W., T. 12 S., R. 15 W., Seward Meridian, along with lands in other townships. Application was made in accordance with sec. 12(a) of ANCSA, 85 Stat. 688, and regulations adopted pursuant thereto in 43 CFR 2651, *et seq.*, "Village Selections." Said decision made findings, summarized as follows:

1. That these described lands are not within the sec. 11(a)(1) withdrawal for the Village of English Bay;

2. That the described lands are within the sec. 11(a)(1) withdrawal for the Village of Port Graham;

3. That while sec. 12(a)(1) of ANCSA does not explicitly state that a village may only select from lands specifically withdrawn for that village, when read in conjunction with another part of ANCSA sec. 11(a)(3)(A) that conclusion is clearly intended.

The decision further comments that there is insufficient available land within the English Bay 25-township withdrawal to enable the village to select its full entitlement; that the Secretary has withdrawn deficiency lands as stipulated by sec. 11(a)(3); and that English Bay Corporation has selected from such lands.

Appellant, English Bay Corporation, asserts in its Statement of Reasons that "this appeal presents a unique set of circumstances and one that was not contemplated by Congress. Because the lands in question were of unique historical and cultural significance to the people of the English Bay Village, Port Graham consented to the selection of these lands by appellant. Port Graham's acquiescence to the selection of its own 11(a) withdrawal lands was formalized in support of this appeal."

Appellant contends that "these facts do not fit the narrow reading

BLM has given sec. 11(a)(1) and 11(a)(3)(A). \* \* \* Congress' primary goal in adopting the sec. 11(a)(1) and 11(a)(3)(A) land withdrawal scheme was to protect the right of full entitlement and to protect village claims from the potential competition of the State and others. While Congress certainly intended to protect a particular village's 11(a)(1) withdrawal from invasion by a neighboring village \* \* \* Congress did not legislate with the prospect in mind that a village would willingly relinquish land withdrawn for it under 11(a)(1) to another village \* \* \*."

Appellant further contends that "since Congress has remained silent on the set of circumstances presented by this appeal, the Board of Appeals must look to ANCSA as a whole and the policy declaration embodied in the Act for guidance in formulating a decision on this appeal."

Appellant offers three alternatives as being consistent with those policies and within the terms of the provisions of ANCSA. *First*, since for various reasons only 300 acres are available for selection in English Bay's core township, and since sec. 12(a)(2) of ANCSA suggests a Congressional intent that selections be in units of at least 1,280 acres, the Board "could consider the land selections which BLM denied as part of the English Bay core township and direct BLM to include these lands so the statutory standard of 1,280 acres can be met." *Second*, the Board could designate

the lands denied by BLM as "substitute deficiency lands" available for English Bay's selection. Appellant contends that the lands under appeal are "of a character similar to those on which the village is located" (ANCSA sec. 11(a)(3)(A)), while presently, the deficiency lands available for English Bay's selection are not of a character similar to those inhabited by the village; nor are those lands as close to the village as the lands denied by the BLM's decision." *Third*, the express consent executed by Port Graham waiving selection and giving preference to selection by English Bay could be treated as being a resolution of a dispute between competing village corporations pursuant to the provisions of sec. 12(e) and regulations adopted in 43 CFR 2651.4(g).

Briefs filed on behalf of the State of Alaska and the Bureau of Land Management by the Regional solicitor's Office in response to appellant's Statement of Reasons variously assert that (1) the lands in question have been tentatively approved for patent to the State of Alaska; (2) these lands were within the sec. 11(a)(1) withdrawal of Port Graham; (3) the lands are contiguous to and/or corners on Port Graham, not on English Bay's (core township); (4) sec. 11(a)(1), when read in conjunction with sec. 11(a)(3)(A) of ANCSA indicate a clear Congressional mandate that village selections can be made only from withdrawals identified for each village; (5) therefore, since the lands in question were not

selected by Port Graham, they are unavailable for selection by English Bay; (6) even if Port Graham could acquiesce in the selection of the land by English Bay, its failure to select these lands prior to the Dec. 15, 1975 selection deadline closes off Port Graham's rights to the land.

For purpose of deciding this appeal, it is necessary to consider only those portions of ANCSA which affect lands available for selection to a qualified Native Village Corporation.

The singular issue presented by this appeal is whether, under ANCSA, English Bay Corporation, with the consent of Port Graham Corporation, can select lands located outside of English Bay's 11(a)(1) withdrawal and within Port Graham's 11(a)(1) withdrawal.

As to the location of lands sought by appellant, English Bay Corporation, certain facts as given in the Decision of the State Director are undisputed in this appeal as follows:

1. Village of English Bay Corporation is located wholly within T. 9 S., R. 16 W., of the Seward Meridian.

2. T. 12 S., R. 14 W., and T. 12 S., R. 15 W., of the Seward Meridian are by description both outside the tiers of townships described in sec. 11(a)(1)(B) and (C) of ANCSA in relation to T. 9 S., R. 16 W., of the Seward Meridian.

3. Village of Port Graham Corporation is located within both T. 9

S., R. 15 W., and T. 10 S., R. 15 W., of the Seward Meridian.

4. T. 12 S., R. 14 W., and T. 12 S., R. 15 W., of the Seward Meridian are by description within the tiers of townships described in sec. 11(a)(1)(B) and (C) in relation to the townships within which the Village of Port Graham Corporation is located.

As to the assertion in briefs filed by the State of Alaska and Regional Solicitor's Office (for the BLM) that the lands in question have been tentatively approved to the State of Alaska, neither the record before the Board or appellant English Bay confirms nor rebuts such assertion.

[1] Provisions of ANCSA as enacted and regulations adopted pursuant thereto in 43 CFR, subpart 2651, governing withdrawal and selection procedures, are definite in meaning and present no problem of ambiguity.

Sec. 11(a)(1) of ANCSA not only provides for the withdrawal of all public lands from any form of appropriation, subject to stated exceptions and limitations, which created a status of being available for selection by a qualified Native Village Corporation, but also established by description that the lands so withdrawn enclose an identified village and are situated in a clearly defined location relative to said village in the following manner:

(A) The lands in each township that enclose all or part of any Native village identified pursuant to Subsection (b);

(B) The lands in each township that is contiguous to or corners on the town-

ship that encloses all or part of such Native village; and

(C) The lands in each township that is contiguous to or corners on a township containing lands withdrawn by paragraph (B) of this subsection.

Due to the physical location of a Native Village Corporation in relation to either the natural terrain or because of circumstances provided by ANCSA, lands within the described withdrawal area actually available for selection may be greatly reduced. The effect of describing lands made available for selection in the above manner denies to a Village Corporation so limited any alternative for extending this withdrawal status to any other lands.

The appellant's reference to explanation of the Conference's rejection of the "free floating" concept is not applicable to the selection by English Bay of lands outside of its defined withdrawal. Pursuant to the terms of sec. 13(b)(3)(A) of the Senate's version before conference, in the event less than 25-townships were available for withdrawal as provided (in the manner as described in sec. 11(a)(1) ANCSA) due to the village's location, land withdrawn to provide an equivalent acreage was to be made from public lands in the nearest proximity to the center of the village. It is this aspect of uncertainty of location of withdrawal lands which was being addressed and not the need to provide for a deficiency selection to complete entitlement in the manner provided for as in sec. 11(a)(3)(A) of ANCSA.

Sec. 11(3)(A) the pertinent part of which recites as follows:

If the Secretary determines that the lands withdrawn by subsections (a)(1) and (2) hereof are insufficient to permit a Village or Regional Corporation to select the acreage it is entitled to select, the Secretary shall withdraw three times the deficiency from the nearest unreserved, vacant and unappropriated public lands. In making this withdrawal, the Secretary shall, insofar as possible, withdraw public lands of a character similar to those on which the village is located and in order of their proximity to the center of the Native village: \* \* \*.

The remaining provisions enumerate factors to be considered in determining the location of lands to be selected and the effect thereof. The condition necessary to be satisfied before additional land could be withdrawn by the Secretary and made available for selection—(i.e., a Secretarial determination that a village's acreage entitlement cannot be met by lands which are withdrawn by sec. 11(a)(1) and (2))—is clearly stated and not subject to any ambiguity on its face. It was only after all possible selection has been made within the lands described in sec. 11(a)(1) and (2) that applicants could select from lands described in sec. 11(a)(3)(A). Said subsection thus places in a single provision, both the manner of attaining a village's deficiency acreage entitlement, and also assures selection protection by authorizing withdrawal of 3 times the deficiency.

[2] Sec. 12(a) of ANCSA and Regulations set forth in 43 CFR 2651.4 adopted pursuant thereto,

June 4, 1976

require that all land available for selection situated within the township or townships enclosing that particular Native village must first be selected. Selections necessarily made by the village corporation of additional land is provided for as follows:

Plus an area that will make the total selection equal to the acreage to which the village is entitled under Section 14. The selection shall be made from lands withdrawn by Subsection 11(a).

The remaining provisions of subsec. (a) describe acreage limitations to selections which are dependent upon the prior existence of previous withdrawals or appropriations of such land. Sec. 12(a)(2) of ANCSA and regulations in sec. 2651.4(b) describe additional requirements affecting selections of lands which have complied with limitations set forth in sec. 12(a)(1), *supra*.

Appellant's, English Bay Corporation, contention that the Board could construe the provisions of sec. 12(a)(2) to be applicable to the lands in question is not sustainable by the terms of ANCSA. Inasmuch as the limitations and restrictions therein described to selection by a village corporation are expressly made applicable to only those lands which have been selected pursuant to provisions of sec. 12(a)(1), it is first required that selection was made pursuant thereto. To determine that complying with a particular restriction, *i.e.*, acreage limitation, without first satisfying the selection location requirement is in-

consistent with the clear expression of the Act.

English Bay, appellant, is identified as being a qualified Native Village Corporation for the purpose of making selections pursuant to the terms of this section. The amount of total acreage to which English Bay Corporation is entitled to select is determined by the provisions of sec. 14(a) of ANCSA.

The requirement that English Bay Corporation select land in compliance with secs. 12(a)(1) and 11 of ANCSA is not satisfied by a consent and waiver of rights by Port Graham Corporation to land not otherwise available. To permit such consent to be substituted for selection requirements otherwise applicable is contrary to this subsection.

[3] The contention of Appellant, English Bay Corporation, in further proposing that the Board could construe the provisions of sec. 12(e) to be applicable to this appeal is not sustainable by the terms of ANCSA.

Sec. 12(e) of ANCSA provides for settlement by arbitration of a dispute arising out of the single instance in which the selection rights of two or more Native villages exist within overlapping withdrawal areas. Inasmuch as each village must select all deficiency of entitlement due only from land made available by withdrawal in compliance with terms of sec. 11(a)(3) (A), the only instance of possible competition between Native Vil-

lage Corporations is in a single land withdrawal for both under the terms of sec. 11(a)(1) with each having the right to select. The loss of acreage resulting from the arbitrator's decision would be made up by applying provisions of sec. 11(a)(3)(A).

Before the provisions of this subsection could be appropriate to this appeal, both English Bay Corporation and Port Graham Corporation would be required to have made selection of land which each had a right to select, *i.e.*, if selection was of land within the sec. 11(a)(1) withdrawal of both villages. The lands in question in this appeal are not located within a dual withdrawal.

Further, an examination of the contents of earlier legislative proposals and hearings shows considerable attention was given to deficiency selections and the problems of competitive rights of selections.

To these problem areas, both the Senate and House versions of proposed legislation provided different possible remedies. (Reference will be made to portions of those versions passed by the House and Senate and sent to the Committee of Conference from which the Report (to accompany H.R. 10367) dated Dec. 13, 1971, was finalized in the form enacted as secs. 11, 12, and 14 of ANCSA.) The method adopted in House Resolution 10367 *as amended* in the Report dated Sept. 28, 1971, is of particular significance in that it enables the Board to construe the pro-

visions of ANCSA consistent with Congressional intent as expressed in this measure. Sec. 9 thereof provided for withdrawal of public lands for selection by a village corporation in the same general manner as sec. 11(a)(1) of ANCSA. The only provision of House Resolution 10367 which provided for the selection of additional land if it were not possible to satisfy the total allotment of acreage to which a village was entitled from those townships situated within the described withdrawal areas was sec. 11(c) at page 31 of that Bill which provides as follows:

If sufficient lands for the purpose of Subsections (a) and (b) are not available from the withdrawn lands surrounding a village, *the shortage may be selected from lands withdrawn for, but not selected by, any other village in the same region.* All selections shall be contiguous and in reasonably compact tracts according to Federal or State protraction diagrams or approved surveys except as separated by bodies of water. (*Italics added*)

Such provision, had it been included in ANCSA as finally enacted, would clearly have been applicable to the issue before the Board in this appeal and English Bay Corporation could have selected land within the withdrawal area of Port Graham Corporation in the event Port Graham declined to do so.

The Senate version also adopted provisions for withdrawal of lands for selection in the manner as provided in sec. 11(a)(1) of ANCSA, except to provide for a "free float-

July 1, 1976

ing" method of obtaining additional withdrawals to make up any needed equivalent acreage of 25 townships. Sec. 14(b), thereof provided for selections of non-contiguous public land in order of nearness of proximity to the village should selection of entitlement not be possible from already withdrawn lands. Provision was further made for additional land to be made available to make up a loss to a village which released selected land to another Native village in any overlap area.

It is emphasized that the Committee was aware of all provisions of both the House and Senate versions and the meaning thereof in concluding the terms adopted in the final provisions of ANCSA. Thus in every instance where provision was proposed for any selection of land outside of the regularly defined withdrawal townships, there had been an elimination of such alternative selections which were replaced with the terms of provisions of sec. 11(a)(3)(A) of ANCSA.

It is the decision of the Board based upon the findings discussed above that the decision of the Bureau of Land Management is affirmed. In reaching this conclusion, it is the determination of the Board that selections made by village corporations pursuant to the terms of sec. 12(a)(1) of ANCSA and regulations adopted pursuant thereto are limited to lands which are available and situated only within the townships which are described in

sec. 11(a)(1) in relation to that particular Native village. Any selection which is made of land outside those described townships is limited to the provisions for providing deficiency lands under the terms of sec. 11(a)(3)(A).

NOW THEREFORE, the Decision of the Bureau of Land Management #AA-6664-B, dated Aug. 29, 1975, is affirmed.

This represents an unanimous decision of the Board.

JUDITH M. BRADY,  
*Chairman.*

WE CONCUR:

ABIGAIL F. DUNNING,  
*Member of the Board.*

LAWRENCE A. MATSON,  
*Member of the Board.*

## APPEAL OF SELDOVIA NATIVE ASSN., INC.\*

1 ANCAB 65

Decided July 1, 1976

Appeal from the Decision of the Alaska State Office, Bureau of Land Management #AA-6701-C, AA-6701-D, dated Oct. 25, 1974, rejecting in part village land selections of Seldovia Native Association, Inc., under secs. 11 and 12 of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1624 (Supp. IV, 1974), as amended, 89 Stat. 1145 (1976).

\*Not in Chronological Order.

Decision of the Bureau of Land Management dated Oct. 25, 1974, affirmed July 1, 1976.

# **1. Alaska Native Claims Settlement Act: Definitions: Generally—Words and Phrases**

"Public lands" are defined in sec. 3(e) of the Alaska Native Claims Settlement Act, as follows:

"Public lands" means all Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation, and (2) land selections of the State of Alaska which have been patented or tentatively approved under sec. 6(g) of the Alaska Statehood Act, as amended (72 Stat. 341, 77 Stat. 223), or identified for selection by the State prior to Jan. 17, 1969. The "except" clause contained in the definition of public lands in sec. 3(e) of ANCSA must be read as an expression of Congressional intent not to include particular lands rather than as an "exception" from lands included in the general definition of public lands.

## **2. Alaska Native Claims Settlement Act: Definitions**

The definition of public lands in sec. 3(e) cannot be interpreted to mean that all classes of State land in Alaska are necessarily "Federal lands or interests therein" unless such classes of lands are specifically excepted within the definition itself.

## **3. Alaska: Land Grants and Selections: Mental Health Lands—Alaska Native Claims Settlement Act: Aboriginal Claims**

Sec. 4 of ANCSA states:

(a) All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal

law, and all tentative approvals pursuant to sec. 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.

(b) All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.

(c) All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished.

The effect of the extinguishment of aboriginal claims by sec. 4 of ANCSA, as explained in the Conference Report (S. Rep. No. 92-581), 92d Cong., 1st Sess., 40 (1971) and interpreted by *Edwardsen v. Morton*, 369 F. Supp. 1359 (D.C. 1973), necessarily defeats arguments that Mental Health lands remained public lands based on assertions of aboriginal title.

## **4. Alaska: Land Grants and Selections: Mental Health—Alaska Native Claims Settlement Act: Land Selections: Withdrawals**

Because Alaska acquired a present right or interest in Mental Health Lands immediately upon proper selection of same, and because that interest effectively transfers ownership in the lands to the State, such lands can no longer be considered "public lands" within the meaning of sec. 3(e) and are unavailable for Native village selection under secs. 11(a) (1) and 12(a) (1) of ANCSA.

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### 5. Alaska: Land Grants and Selections: Mental Health—Alaska: Statehood Act

The authority to select lands under the Alaska Mental Health Enabling Act, while confirmed to the State under sec. 6(k) of the Statehood Act, remains separate and distinct from the authority of the State to select lands as provided in secs. 6(a) and (b) of the Statehood Act.

### 6. Alaska: Land Grants and Selections: Mental Health—Alaska Native Claims Settlement Act: Land Selections: Withdrawals

Lands properly selected under the Alaska Mental Health Enabling Act are not "lands \* \* \* that have been selected \* \* \* by the State under the Alaska Statehood Act" and are not available for selection by Native villages under secs. 11(a) (2) and 12(a) (1) of ANCSA.

**APPEARANCES:** John W. Burke, Esq., Office of the Regional Solicitor, Anchorage, on behalf of the State Director, Bureau of Land Management; James N. Reeves, Esq., Assistant Attorney General, on behalf of State of Alaska; A. Robert Hahn, Jr., Esq., on behalf of Seldovia Native Assn.; James Vollintine, Esq., on behalf of Cook Inlet Region, Inc.; Theo L. Carson, Jr., Esq., on behalf of Kenai Peninsula Borough.

### OPINION BY CHAIRMAN BRADY

### ALASKA NATIVE CLAIMS APPEAL BOARD

Seldovia Native Association, Inc., and Cook Inlet Region, Inc., appeal from a decision of the Alaska State Office, Bureau of Land

Management, dated Oct. 25, 1974, which rejected in part village land selection application AA-6701-D, and rejected in entirety application AA-6701-C, both filed by Seldovia Native Association, Inc., for lands contained in Ts. 7 and 8 S., R. 13 W., Seward Meridian, pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1624 (Supp. IV, 1974), *as amended*, 89 Stat. 1145 (1976) (ANCSA).

These village selection applications included lands which had been selected by the State of Alaska, in two separate land selection applications, A-058326 and A-057389. Selection application A-058326 was originally filed on Nov. 19, 1962, as a general purposes selection under sec. 6(b) of the Alaska Statehood Act, P.L. 85-508, 72 Stat. 339, 48 U.S.C., Ch. 2 (1970). On Dec. 11, 1963, the State filed an amendment to apply for the same lands under the Act of July 28, 1956, the Alaska Mental Health Enabling Act (70 Stat. 711) rather than under the Statehood Act. The selection application was approved on Jan. 15, 1964.

Selection application A-050891 was originally filed on Dec. 29, 1959, and was amended on Dec. 10, 1963, the State of Alaska requesting that A-057389 be processed as a Mental Health land selection, rather than as a general purpose grant under the Statehood Act. The selection application was approved on Jan. 13, 1964.

The Oct. 25, 1974, decision of the Bureau of Land Management

rejected the Seldovia village land selections on two grounds. First, the lands in question had previously been selected by the State under the authority of the Mental Health Act, could not be considered "public lands" as defined by ANCSA or the applicable regulations, and therefore were not available for selection as "public lands" under sec. 11(a)(1) and 12(a)(1) of ANCSA. Second, the lands selected by the State under the Mental Health Enabling Act were not lands selected "under the Statehood Act," and thus were not available for selection under sec. 11(a)(2) and 12(a)(1). The Board concurs.

Appellants Seldovia and Cook Inlet Region contend that lands selected by the State under the Mental Health Act are available for Native village selection under secs. 11(a)(1) and 12(a)(1) of ANCSA, or, in the alternative, if the Board finds Mental Health lands not to be "public lands" as defined by ANCSA, that such lands are available, subject to the 69,120 acre limitation for Native village selection under secs. 11(a)(2) and 12(a)(1) of ANCSA.

## ISSUE I

Are lands selected by the State under the Mental Health Act "public lands" within the meaning of secs. 3(e) and 11(a)(1) of ANCSA and thus available for village selection by Seldovia under sec. 12(a)(1) of ANCSA?

[1] Sec. 3(e) of ANCSA defines "public lands" as:

\* \* \* all Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation, and (2) land selections of the State of Alaska which have been patented or tentatively approved under sec. 6(g) of the Alaska Statehood Act, as amended (72 Stat. 341, 77 Stat. 223), or identified for selection by the State prior to Jan. 17, 1969.

Sec. 11(a)(1) of ANCSA provides:

The following public lands are withdrawn, subject to valid existing rights, from all forms of appropriation under the public land laws \* \* \* and from selection under the Alaska Statehood Act, as amended:

(A) The lands in each township that encloses all or part of any Native village identified pursuant to subsection (b);

(B) The lands in each township that is contiguous to or corners on the township that encloses all or part of such Native village; and

(C) The lands in each township that is contiguous to or corners on a township containing lands withdrawn by paragraph (B) of this subsection.

Sec. 12(a)(1) provides:

During a period of three years from the date of enactment of this Act, the Village Corporation for each Native village identified pursuant to sec. 11 shall select, in accordance with rules established by the Secretary, all of the township or townships in which any part of the village is located, plus an area that will make the total selection equal to the acreage to which the village is entitled under sec. 14. The selection shall be made for lands withdrawn by subsec. 11(a): *Provided*, That no Village Corporation may select more than 69,120 acres from

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lands withdrawn by subsec. 11(a)(2)  
\* \* \*. (Italics supplied.)

43 CFR 2650.0-5(g) of the Departmental regulations relating to Village Land Selections, issued pursuant to sec. 25 of ANCSA and the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (1970), defines "public lands" as:

\* \* \* all Federal lands and interests in lands located in Alaska (including the beds of all nonnavigable bodies of water) except:

(1) The smallest practicable tract, as determined by the Secretary, enclosing land actually used, but not necessarily having improvements thereon, in connection with the administration of a Federal installation; and,

(2) Land selections of the State of Alaska which have been patented or tentatively approved under sec. 6(g) of the Alaska Statehood Act, as amended (72 Stat. 341; 77 Stat. 223; 48 U.S.C. Ch. 2), or identified for selection by the State prior to Jan. 17, 1969, except as provided in sec. 2651.4(a)(1) of this chapter.

Sec. 2651.4(a) provides:

Each eligible village corporation may select the maximum surface acreage entitlement under secs. 12(a) and (b) and sec. 16(b) of the [A]ct. Village corporations selecting lands under sec. 12(a) and (b) may not select more than:

(1) 69,120 acres from land that, prior to Jan. 17, 1969, has been selected by, or tentatively approved to, but not yet patented to the State under the Alaska Statehood Act;

\* \* \* \* \*

## APPELLANT'S ARGUMENT

Seldovia bases its assertion that lands selected by the State under Mental Health Act are "public

lands" within the meaning of secs. 3(e) and 11(a)(1) of ANCSA on the following arguments:

Immediately prior to ANCSA, all lands (including Mental Health lands) selected by, tentatively approved to, and patented to Alaska remained "public lands" or "Federal lands and interests therein" because such lands were subject to aboriginal title. Conveyances to the State by the Federal government were contrary to Native rights under sec. 4 of the Statehood Act and the trust responsibility of the Federal government to the Alaska Natives and therefore were void when given. *Edwardsen v. Morton*, 369 F. Supp. 1359 (D.C. 1973). In effect, titles to these lands never left the Federal government, and selection and patent were subject to attack and cancellation, thereby entitling the Natives subsequently to select such lands as public lands. *United States v. State of Minnesota*, 270 U.S. 181 (1926).

Seldovia contends that Congress recognized the "public" status of such lands in drafting the definition of public lands in sec. 3(e), because the use of the term "except" impliedly considers "land selections of the State of Alaska which have been patented or tentatively approved" \* \* \* as "federal lands or interests therein" while at the same time specifically exempting such lands from the definition.

Had such lands not been specifically exempted, Seldovia argues, they would be necessarily included

as Federal lands and available for village selection under secs. 11(a) (1) and 12(a) (1) of ANCSA.

Appellant, therefore concludes that since Mental Health lands occupy the same legal relationship to the Federal government as do other lands selected and TA'd to the State, *i.e.*, they were selected in derogation of Native rights under sec. 4 of the Statehood Act, and since Mental Health lands are not specifically excepted in sec. 3(e), legal title to such lands remains in the Federal government and Mental Health lands are "federal lands and interests therein" subject to village selection under ANCSA.

### DISCUSSION

The basis for Seldovia's argument relating to the status of lands "excepted" by sec. 3(e) (2) and the basis for the cancellation of the patent to the State in *United States v. Minnesota, supra*, is the effect of pending prior claims of aboriginal title to the lands in question at the time of selection. Contrary to appellants' contentions, however, the effect of sec. 4 of ANCSA, as explained in the Conference Report, was "to extinguish *all* aboriginal claims and *all* aboriginal titles, if any, of the Native people of Alaska." (*Italics added.*) The language of settlement is to be "broadly construed to eliminate such claims and titles as the basis for any form of direct or indirect challenge to land in Alaska." S. Rep. No. 92-581, 92d Cong., 1st Sess., 40 (1971). The Conference

Report states that sec. 4 of ANCSA is, in substance, the same as the language of the Senate amendment.

S. Rep. No. 92-405, 92d Cong., 1st Sess. (1971), in turn, explains sec. 4(a) of S. 35 as follows:

Subsection 4(a) declares that the provisions of this Act constitute a full and final extinguishment of any and all claims based upon aboriginal right, title, use or occupancy of land in Alaska \* \* \*. The extinguishment is final and effective not only for claims against the United States but also for any claims against the State of Alaska and all other persons. Remaining in effect and unextinguished by this Act are all claims which are based upon grounds other than the loss of original Indian title land. Included in such unextinguished claims are suits for \* \* \* tort or breach of contract \* \* \*. S. Rep. No. 92-405, *supra*, at 110.

Seldovia's construction of ANCSA is contrary not only to sec. 4 of ANCSA and the explanation thereof given in the accompanying Committee Reports, but also contrary to a complete reading of *Edwardsen*, upon which appellants rely for this argument. Seldovia, quoting from *Edwardsen v. Morton, supra* at 1374-75, states that:

[T]he Statehood Act, read as a whole and read in the light of a legislative history showing an intent to avoid any prejudice to Native possessory rights until such time as Congress should determine how to deal with them, did not authorize the State to select lands in which Natives could prove aboriginal rights based on use and occupancy. Accordingly, tentative approvals of the Secretary of the Interior of land selections in which such rights can be proven were void at the time they were granted. Brief of Cook Inlet Region, Inc. (Oct. 2, 1974) at 7-8.

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It must be noted, however, that after stating its position on the effect of the Statehood Act, the Court in *Edwardsen* goes on to discuss the effect of ANCSA and states that the attempt by plaintiff Arctic Slope Native Association to challenge title to lands selected by Alaska and tentatively approved under sec. 6(g) of the Statehood Act must be rejected despite the Court's finding that the approvals were void when granted.

Section 4(a) of the Settlement Act expressly validates those approvals by retroactively removing the only impediment to selection of the lands, i.e., by stating that those approvals (as well as other prior conveyances) shall be regarded as an extinguishment of the aboriginal title thereto, if any \* \* \*.

In short, Congress could constitutionally, and did in effect, give the State good title to land tentatively approved before the Settlement Act for patent to the State. It did this by removing the only impediment to the validity of the approvals rather than by making a new conveyance of title. In doing this, Congress fully intended that there should be no further "cloud" on land titles in Alaska stemming from aboriginal land claims, and that legal challenges to title based on such claims should be barred. *Edwardsen v. Morton*, *supra*, at 1377-78.

In sum, § 4 of the Settlement Act, as explained in the Conference Report and interpreted by the Court in *Edwardsen*, extinguished the cloud of aboriginal claim on conveyances to the State. Such extinguishment removed the only vulnerability to divestment of State patented lands. Since patent is the highest evidence of title by which

any and all interest in the land is transferred from the United States, lands patented to the State cannot be considered Federal or public lands. *Wilson Cypress Co. v. Del Pozo Y Marcos*, 263 U.S. 635 (1915); *Beard v. Federy*, 70 U.S. (3 Wall.) 478 (1865). If lands patented to the State cannot be considered public lands, it follows that other lands identified within § 3(e) (2) would not *necessarily* have been considered public lands had they not been specifically excepted. The entire clause, therefore, cannot be considered an "exception" in the strict sense of the word. Rather, sec. 3(e) (2) was employed out of abundant caution to *explain* the term "public lands" as used in ANCSA, and to emphasize Congressional intent.

[2] The Board concludes therefore, that the definition of "public lands" in § 3(e) cannot be interpreted to mean that all classes of State Land in Alaska are *necessarily* "Federal lands or interests therein" unless such lands are specifically excepted within the definition itself.

Such conclusion, however, does not preclude the question of whether lands selected by the State under the Mental Health Act are, "public lands" as defined by ANCSA.

Generally, the term "public lands" is used to describe such lands as are subject to sale or other disposal under general law. *Newhall v. Sanger*, 92 U.S. 761 (1865). The term refers to the general public domain, unappropriated land, land belonging to the United States

which is subject to sale or other disposal under the general land laws and not reserved or held back for any special governmental or public purpose. *Ben J. Boshetto*, 21 IBLA 193 (1975). It does not include lands to which rights have attached and become vested through full compliance with applicable land laws. *Holz v. Lyles*, 280 Ala. 321, 195 So. 2d 897 (1967). It is however, a term of varying senses, depending largely on the context in which it appears and the special circumstances of the case. *Kindred v. Union Pacific Railroad Co.*, 225 U.S. 582 (1912).

The State of Alaska contends that its rights vested to Mental Health lands, that it has equitable title therein, that such lands can no longer be considered public lands, and that, therefore, lands selected under the Mental Health Act are not public lands withdrawn for selection by sec. 11(a)(1) of ANCSA. The State, as does the Bureau of Land Management, relies on *Payne v. State of New Mexico*, 225 U.S. 367 (1921), and related cases for this proposition.

Prior to a discussion of the State's position relating to equitable title in the Mental Health lands, it is appropriate to set forth the pertinent provisions of the Alaska Mental Health Enabling Act and the regulations promulgated thereunder.

As sec. 202(e) of the Mental Health Act provides, all of the one million acres of land granted to the

Territory of Alaska, together with the income therefrom and the proceeds from any dispositions thereof, were to be administered by the Territory as a public trust, and such proceeds and income were first to be applied to meet the necessary expenses of the mental health program of Alaska. Sec. 202(e), 70 Stat. 711.

Statute: § 202:

(a) The Territory of Alaska is hereby granted and shall be entitled to select, within ten years from the effective date of this Act [July 28, 1956], not to exceed one million acres from the public lands of the United States of America which were vacant, unappropriated and unreserved at the time of their selection: *Provided*, that nothing herein contained shall affect any valid existing rights. All lands duly selected by the Territory of Alaska pursuant to this section shall be patented to the Territory by the Secretary of the Interior.

(b) The lands authorized to be selected by the Territory of Alaska by subsection (a) of this section shall be selected in such manner as the laws of the Territory may provide, and in conformity with such regulations as the Secretary of the Interior may prescribe.

\* \* \* \* \*

(d) Following the selection of lands by the Territory pursuant to subsection (b), but prior to the issuance of final patent, the Territory shall be authorized to lease and to make conditional sales of such selected lands.

Regulations — 43 CFR 76.7-76.10 (1958):

§ 76.7. *Statutory authority.* (a) The Act of July 28, 1956 (70 Stat. 709, 711, 712), as supplemented, July 7, 1958 (72 Stat. 339; 343; 48 U.S.C. 46-3) referred to in §§ 76.7 to 76.10 as "the act," grants to the Territory of Alaska the right to

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select within 10 years from July 28, 1956, not to exceed the unsatisfied portions of one million acres from the public lands in Alaska which are vacant, unappropriated and unreserved at the time of selection.

§ 76.10. Following the selection of lands by the Territory pursuant to the requirements of § 76.9, the State shall be authorized to lease and make conditional sales of such selected lands pending survey of the lands, if necessary, and issuance of patent.

In *Payne v. State of New Mexico*, *supra*, *Payne v. Central Pac. Ry. Co.*, 255 U.S. 228 (1921) and *State of Wyoming v. United States*, 255 U.S. 489 (1921), it was held that where the State (or the railroad company in *Central Pac. Ry. Co.*), has made a proper selection of land to which it was entitled at the time of selection, the State (or the railroad company), has the equitable title to the land from the time of selection and that the government holds the land in trust for it.

In each of these cases, however, whether under a school land grant or under a railroad land grant, the selecting party had already acquired title to particular lands and, by making a subsequent selection of other lands, thereby waived or surrendered his title to the tract in place. The selections were *in lieu* selections, *i.e.*, the provision under which the selection was made was one inviting and proposing an exchange of lands.

Each of the above cases involves a waiver of specific tracts of land, title to which had vested in either the State or the railroad company,

either upon admission and final survey of the land, or upon compliance with the requirements of the railroad grant. The selecting party had surrendered its title to these lands in exchange for land selected in accordance with regulations issued by the Secretary of the Interior. The selector thereby assumed the position of a claimant to public lands who, having complied with all the requirements of a particular public land law, acquired equitable title to the land. The selection was made subsequent to an exchange or relinquishment of lands to which the selector had already acquired title. The selection was made to replace lands actually lost.

In the appeal currently before the Board, however, the State had acquired no vested rights in any lands prior to its selection under the Alaska Mental Health Enabling Act. The State had acquired no title to tracts of land in place, for which *lieu* selections could be made when such lands were subsequently appropriated by the Federal government. The selections here were not selections filed after the State had exchanged lands to which it had already acquired title. No exchange or waiver had taken place.

Rather, the Mental Health selections were of lands to which the State can lay no claim other than the right conferred upon it by the Mental Health Act to select up to one million acres of vacant, unappropriated and unreserved lands

in Alaska. The State has given up nothing in return for its right to select these lands, but has merely exercised the right to select lands granted it by the Mental Health Act. Until a selection was filed by the State, it had no claim to the land selected. The State was not required to meet any conditions prior to making its selection under the Mental Health Act. Therefore, the proper filing of a selection under the Mental Health Act is not precisely analogous to the in lieu selections described in the above-discussed cases.

Seldovia, in response, contends that until such time as a final survey is approved by the Secretary, or, under the terms of the Mental Health Act, until such time as the final survey is made and final patent issued, title to lands selected under the Mental Health Act does not pass, but remains in the Federal government which is free to dispose of same until survey. Appellants rely on *United States v. State of Wyoming*, 331 U.S. 440 (1947), and the cases cited therein for their position.

*United States v. State of Wyoming*, *supra*, held that under the Wyoming Enabling Act which provided that secs. 16 and 36 in each township are hereby granted to the State for the support of common schools, title to unsurveyed school lands passes to the State only at the date of survey and then only where the Federal government has made no other disposition of land prior to that time.

The Court in *State of Wyoming*

stated that the Supreme Court had consistently held that, in construing the terms and provisions of school land grants:

\* \* \* [T]itle to unsurveyed sections of the public lands which have been designated as school lands does not pass to the State upon its admission into the Union, but remains in the Federal Government until the land is surveyed. Prior to survey, those sections are a part of the public lands of the United States and may be disposed of by the Government in any manner and for any purpose consistent with applicable federal statutes. If upon survey it is found that the Federal Government has made a previous disposition of the land, the State is then entitled to select lieu lands as indemnity in accordance with provisions incorporated into each of the school land grants. The interest of the State vests at the date of its admission into the Union only as to those sections which are surveyed at that time and which previously have not been disposed of by the Federal Government.  
\* \* \*

*United States v. State of Wyoming*, *supra* at 443-444.

In order to determine what effect the holding in *State of Wyoming* has upon the decision on appeal before the Board, it is necessary to distinguish the set of facts in *State of Wyoming* from that in *Payne v. State of New Mexico*, *supra*, and related cases which involved in lieu, indemnity selections. In the latter set of cases, an exchange of lands had been accomplished, actual losses had been suffered and the claim to the selected land has arisen only after due consideration had been given by the State or the railroad company. In *State of Wyoming*, the issue was whether the State had equitable title to the designated

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tracts prior to survey. In *State of New Mexico* and the related cases, the state had already acquired title to the designated tracts, but had, under the terms of the school land grants, relinquished title in exchange for in lieu selections. The issue was whether title vested upon selection of the lieu lands, consideration (through the relinquishment of the designated tracts) already had been given for such lieu lands.

*State of Wyoming* and related cases cited therein must also be distinguished from this appeal. There, the school land grants conveyed designated tracts in place to the State upon its admission. Unless the Federal government had previously disposed of these designated townships, the State had no right to select other lands. The townships were conveyed regardless of their physical properties or economic potential. The State was expected to receive the land "as is" unless the Federal government, prior to survey, found a better use for same. Under the Mental Health Act, however, the State of Alaska was free to choose, in fact, was required to make its own choice of lands, according to its own needs and desires. The authority and control granted the State of Alaska in its choice of lands ultimately to be received by the State was considerably greater under the terms of the Mental Health Act.

Under the school land grants, where the states initially had no choice concerning the lands to be received, specific provision was

made for indemnity selections by the State only when the Federal government disposed of the designated sections prior to survey. The statute clearly contemplated the possibility of prior Federal disposition of the lands, reflecting the need at the time for the Federal government to be given a free hand in making such public withdrawals and reservations as it saw fit. By allowing for such disposition right up to the time of final survey, Congress intended for the Land Officers to hold the public interest above that of the State. Any interest sacrificed by the State was not considered to be a great one because the State in fact had exercised no choice in selecting the lands it received under the grant. The designated tracts were given to the State not because of any particular value attributed them, but only on the basis that they were located in specific townships, irrespective of other considerations. It was important that the States receive lands for the purpose of supporting their school programs, but the State had no voice in determining which land was to be designated for such purposes.

The conditions existing, however, at the time of enactment of the Alaska Mental Health Enabling Act were substantially different from those in existence at the time of enactment of the school land grants, and the statute was shaped accordingly. Because Alaska was allowed to choose the lands it needed to support its mental health

programs, and because no interest passed from the Federal government to Alaska until Alaska made its selections, no indemnity provisions were necessary. The statute did not contemplate that the Federal government would deprive Alaska of lands selected by it prior to final survey.

Under the school lands grants, the states initially had no opportunity to select lands, as they were required to receive designated townships for support of their schools. Only if the Federal government found these particular townships to be more valuable for public purposes, did the state have an opportunity to select other lands. Under the Mental Health Act, Alaska was granted the right to select lands initially, thereby assuring that it would receive those lands to which it had exercised its right of selection. As the interest in school lands vested in the state upon selection of lieu lands, so did Alaska's interest in its Mental Health lands vest upon their selection.

For these very reasons, provision was made in the Mental Health Act for reconveyance by the State prior to issuance of final patent by the Federal government. Although a major concern in the school grants was to allow the Federal government the freedom and flexibility to shape its public land policy, the concern in the Mental Health Act was to allow for immediate development by the Territory of the land resources, to produce revenues therefrom and thereby reduce the financial burden of territorial programs

upon the Federal government. In the one instance, the greater concern was for the Federal government's need for public reservations and withdrawals, and in the other, for the Territory's development of the lands involved.

Under the terms of the Mental Health Act, it is clear that Congress did intend for Alaska to be able to reconvey Mental Health lands prior to survey and final patent, and that the interest of Alaska in the Mental Health lands was not conditional upon and subject to subsequent use classification by the Federal Government.

It is determined, therefore, that the interest acquired by Alaska in lands selected under the Mental Health Act is in the nature of the interest acquired by a state in its indemnity selections under school land grants rather than the interest acquired by a state in conveyances of designated townships under the school land grants.

[3] The question of the effect of aboriginal claims on lands selected under the Mental Health Act, *i.e.*, whether such selections were void because of aboriginal claims, is answered by sec. 4 of the Settlement Act and *Edwardsen v. Morton*, *supra*. The clear intent of sec. 4 is to "eliminate such claims and titles as the basis for any form of direct or indirect challenge to land in Alaska." S. Rep. 92-581, *supra*, at 40, S. Rep. No. 92-405, *supra*, at 110. Therefore, sec. 4 of ANCSA necessarily defeats arguments that Mental Health lands re-

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mained public lands, based on assertions of aboriginal title.

[4] It is thus concluded that Alaska acquired a present right or interest in the Mental Health lands immediately upon proper selection, in the nature of "equitable title." Because that interest effectively transfers ownership in the lands to Alaska, such lands can no longer be considered "public lands" available for selection by Seldovia under secs. 11(a)(1) and 12(a)(1) of ANCSA.

### ISSUE II

Are lands selected by the State under the Alaska Mental Health Enabling Act "lands \* \* \* selected \* \* \* by \* \* \* the State under the Alaska Statehood Act" and thus withdrawn for selection by Seldovia under secs. 11(a)(2) and 12(a)(1) of ANCSA?

### APPELLANT'S ARGUMENT

In the alternative, Seldovia argues that lands selected by the State under the Mental Health Act are lands selected "under the Alaska Statehood Act" and therefore withdrawn for selection under secs. 11(a)(2) and 12(a)(1) of ANCSA.

Seldovia contends that since the Mental Health grant was to the Territory of Alaska, Congress alone had the authority to transfer the property rights from the Territory to the State. At the time of Statehood, the affirmation of the Territorial grant within the Statehood Act was, by definition, a grant under the Statehood Act. Congress,

if it so desired, could have denied Mental Health lands to the new, emerging state, and therefore, the State received its grant of Mental Health lands solely under the Statehood Act.

The tentative approval by the Secretary of the Interior of lands under the Statehood Act applies to all lands duly selected by the State of Alaska pursuant to this Act, and it is Seldovia's position that this applies to Mental Health lands since they were a grant under the Statehood Act, and are, in fact, administered by the State in all respects in the same manner as other State lands.

Further, Seldovia argues that Congress clearly intended that all State selected land within the 25-township withdrawal be available for village selection, and the fact that Mental Health lands were not specifically mentioned as being withdrawn for village selection was a Congressional oversight.

### DISCUSSION

Seldovia argues that sec. 6(k) of the Statehood Act, to wit:

Grants previously made to the Territory of Alaska are hereby confirmed and transferred to the State of Alaska upon its admission.

was a necessary affirmation by Congress of the Territorial grant (of Mental Health Lands) to the State, and such affirmation is, by definition, a grant under the Statehood Act.

It should be noted, however that sec. 6(k) recognized the authority under which Mental Health lands could be selected and transferred and confirmed that authority to the State of Alaska. Section 6(k) recognizes that authority for Mental Health land selections lay elsewhere, and that such authority was confirmed by the Statehood Act. Confirmation by its very nature presumes the prior existence of that which is being confirmed, and sec. 6(k) recognizes pre-existing authority for the selection of lands by the Territory, and transfers that authority which the Territory possessed to the State as its successor to those interests. The Statehood Act confers no original authority for the selection of Mental Health lands upon the State, but merely transfer that right to the State.

[5][6] Lands "that have been selected by \* \* \* the state under the Alaska Statehood Act" are those lands selected under the authority of sec. 6(a) (forest and community lands) and sec. 6(b) (general purposes grant) of the Statehood Act. Grants previously made to the Territory, and confirmed and transferred to the State of Alaska upon its admission are not grants made under the authority of the Statehood Act, but are grants made under separate authority, in this instance, the authority of the Alaska Mental Health Enabling Act and the regulations promulgated thereunder. The Statehood Act did confirm and validate that grant. But certainly authority to select Mental Health lands was derived from the

Mental Health Act and not the Statehood Act.

Contrary to Seldovia's arguments, the phrase "lands \* \* \* that have been selected by, or tentatively approved to, but not yet patented to, the State under the Statehood Act" is not ambiguous. A literal reading of this phrase contained in the withdrawal provisions of sec. 11(a)(2) of ANCSA clearly limits the lands withdrawn by sec. 11(a)(2) of those lands selected by or tentatively approved to the State under the authority of the Statehood Act. The phrase is clear on its face, strictly limiting the types of land available for selection to those selected under the authority of the Statehood Act.

Furthermore, the legislative history of ANCSA is consistent with the literal reading of the phrase and confirms the fact that Congress did not contemplate that Mental Health lands be made available for Native village selection. As Seldovia points out, only one cryptic reference is ever made to Mental Health lands during Congressional consideration of Settlement legislation. All references to State selections were in terms of either the "one hundred two and one-half million acres" or the "one hundred three million acres," the amount of land conveyed to Alaska under the authority of secs. 6(a) and (b) of the Statehood Act. Congress was concerned that the State receive its full entitlement under the Statehood Act and for that reason tried to determine exactly what portions of the land remaining for selection by the State after Native

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selection would in fact be valuable and what portions would be relatively worthless. Such discussions were limited to the acreage the State had previously received and would later be able to select under the Statehood Act, and contained no consideration of lands conveyed by the Mental Health Act. *See H. Rep. No. 92-10, 92d Cong., 1st Sess., 135, 139-45 (1971).*

The concern that the State receive all its 103 million acres is consistent with the fact that Mental Health lands were never considered for Native selection because the authority to select land under the Mental Health Act had long since expired, in 1966. It would be inconsistent for Congress to have voiced so much concern for the State and its full entitlement to the acreage granted it under the Statehood Act while simultaneously depriving the State of its full acreage entitlement under the Mental Health Act.

Because the meaning of "lands \* \* \* selected by the State \* \* \* under the Statehood Act" is clear on its face and because the literal reading thereof is consistent with the legislative history of ANCSA, the Board concludes that lands selected by the State under the Alaska Mental Health Enabling Act are not available for Native village selection under secs. 11(a) (2) and 12(a) (1) of ANCSA, being neither "Federal lands and interests therein," or lands "selected by, or tentatively approved to \* \* \* the State under the Alaska Statehood Act \* \* \*."

Because the Kenai Peninsula Borough has failed to respond in any manner to this appeal other than a Feb. 19, 1976 filing of a Motion for Extension of Time, which Motion was granted in the Board's Feb. 27, 1976 Order granting Extension of Time, it is hereby dismissed as a party for its failure to prosecute.

Seldovia Native Association, Inc.'s Oct. 17, 1975 Request for Oral Argument is denied.

Therefore, pursuant to the authority delegated to the Alaska Native Claims Appeal Board by the Secretary of the Interior, 43 CFR 4.901, the decision of the Alaska State Director, Bureau of Land Management, #AA-6701-C, #AA-6701-D, is affirmed.

This represents an unanimous decision of the Board.

JUDITH M. BRADY,  
*Chairman.*

WE CONCUR:

ABIGAIL F. DUNNING,  
*Member of the Board.*

LAWRENCE A. MATSON,  
*Member of the Board.*

## APPEAL OF OUNALASHKA CORPORATION\*

1 ANCAB 104

Decided July 13, 1976

Appeal from the Decision of the Alaska State Office, Bureau of Land Manage-

\*Not in Chronological Order.

ment #AA-6709-F, dated June 27, 1975, rejecting certain land selections of the Ounalashka Corporation under Secs. 11 and 12 of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1624 (Supp. IV, 1974) as amended, 89 Stat. 1145 (1976).

Decision of the Bureau of Land Management, affirmed July 13, 1976.

### 1. Alaska Native Claims Settlement Act: Definitions: Land Selections

Lands conveyed to private parties by quitclaim deeds issued by the General Services Administration pursuant to the Federal Property and Administrative Services Act of 1949 *as amended*, 40 U.S.C. § 471 *et seq.* (1970), have ceased to be "Federal lands and interests therein;" are not within the definition of "public lands" in sec. 3(e) of ANCSA; and are, therefore, not available for selection.

### 2. Alaska Native Claims Settlement Act: Land Selections: Generally

Where BLM's determination that lands are "property" not suitable for return to the public domain pursuant to the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 472(d) (1970), is not challenged, and the Administrator of the General Services Administration concurs, such determination and concurrence transfer the land from the administrative jurisdiction of the Department of the Interior to that of GSA.

### 3. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Jurisdiction

Issues arising from GSA's disposal of lands as "surplus property" pursuant to the Federal Property and Administrative

Services Act, *supra*, are not within the jurisdiction of the Board.

**APPEARANCES:** John W. Burke, Esq., Office of the Regional Solicitor, Anchorage, on behalf of the State Director, Bureau of Land Management; John A. Smith, Esq., on behalf of the Ounalashka Corporation; Nancy E. Williams, Esq., and Gary Thurlow, Esq., on behalf of the Aleut Corporation.

### OPINION BY CHAIRMAN BRADY

### ALASKA NATIVE CLAIMS APPEAL BOARD

The Alaska Native Claims Appeal Board, pursuant to delegation of authority in the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1624 (Supp. IV, 1974), *as amended*, 80 Stat. 1145 (1976), and the implementing regulations in 43 CFR Part 2650, *as amended*, 41 FR 14734 (Apr. 7, 1976), and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and final decision.

The lands in dispute are located in secs. 3 and 10, T. 73 S., R. 118 W., Seward Meridian, and were selected by the Ounalashka Corporation in village selection #AA-6709-F filed on Dec. 6, 1974. Included in this selection are certain lands previously processed by the Bureau of Land Management under the following designations: AA-8975, Quitclaim Deed, Mar. 3, 1968, 63 Stat. 377; AA-8974, Quitclaim Deed, Mar. 13, 1968, 63 Stat. 377;

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AA-8973, Quitclaim Deed, Mar. 7, 1968, 63 Stat. 377; AA-8976, Quitclaim Deed, Mar. 20, 1968, 63 Stat. 377. The remainder of the selection, described as an aliquot part of sec. 3 and sec. 10, is handled separately by BLM under the selection application #AA-6709-A.

Pursuant to the regulations in 43 CFR Part 2650, *as amended*, and Part 4, Subpart J, the State Director is the officer of the United States Department of Interior who is authorized to make decisions on land selection applications involving Native Corporations under the Alaska Native Claims Settlement Act, subject to appeal to this Board.

In its decision AA-6709-F, dated June 27, 1975, the Bureau of Land Management rejected in whole the Ounalashka Corporation's selection of lands designated above, on the grounds that these lands had been transferred from public ownership under the Federal Property and Administrative Services Act of 1949, 63 Stat. 378. The decision quotes sec. 12(a)(1) of the Alaska Native Claims Settlement Act to the effect that the selection must be made from lands withdrawn from subsec. 11(a) of the Act; notes that sec. 11(a) withdraws *public* lands (*italics added*); further notes that public lands as defined in sec. 3(e) means all Federal lands and interests therein; and concludes that since the disputed lands are no longer in Fed-

eral ownership, they are not available for village selection.

Ounalashka timely appealed this decision.

Pertinent provisions of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1624 (Supp. IV, 1974), *as amended*, 89 Stat. 1145 (1976), hereinafter referred to as ANCSA, are as follows.

Sec. 3(e) defines "public lands" as follows:

"Public lands" means all Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation, and (2) land selections of the State of Alaska which have been patented or tentatively approved under section 6(g) of the Alaska Statehood Act, *as amended* (72 Stat. 341, 77 Stat. 223), or identified for selection by the State prior to Jan. 17, 1969;

Sec. 11(a)(1) provides for the withdrawal of public lands for selection by Native Villages as follows:

The following public lands are withdrawn, subject to valid existing rights, from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and from selection under the Alaska Statehood Act, *as amended*:

(A) The lands in each township that encloses all or part of any Native village identified pursuant to subsec. (b);

(B) The lands in each township that is contiguous to or corners on the township that encloses all or part of such Native village; and

(C) The lands in each township that is contiguous to or corners on a township

containing lands withdrawn by paragraph (B) of this subsection.

Ounalashka, organized under ANCSA as the Ounalashka Corporation, is listed as a Native Village in sec. 11(b)(1) of the Act.

Sec. 12(a)(1) provides as follows:

During a period of three years from the date of enactment of this Act, the Village Corporation for each Native village identified pursuant to sec. 11 shall select, in accordance with rules established by the Secretary, all of the township or townships in which any part of the village is located, plus an area that will make the total selection equal to the acreage to which the village is entitled under sec. 14. The selection shall be made from lands withdrawn by subsec. 11(a): *Provided*, That no Village Corporation may select more than 69,120 acres from lands withdrawn by subsec. 11(a)(2), and not more than 69,120 acres from the National Wildlife Refuge System, and not more than 69,120 acres in a National Forest: *Provided further*, That when a Village Corporation selects the surface estate to lands within the National Wildlife Refuge System or Naval Petroleum Reserve Numbered 4, the Regional Corporation for that region may select the subsurface estate in an equal acreage from other lands withdrawn by subsec 11(a) within the region, if possible.

Sec. 14(a) provides:

Immediately after selection by a Village Corporation for a Native village listed in section 11 which the Secretary finds is qualified for land benefits under this Act, the Secretary shall issue to the Village Corporation a patent to the surface estate in the number of acres shown in the following table: \* \* \*

The lands patented shall be those selected by the Village Corporation pursuant to subsection 12(a). In addition, the Secretary shall issue to the Village

Corporation a patent to the surface estate in the lands selected pursuant to subsection 12(b).

Regulations contained in 43 CFR, Subpart 2651, provide for village selections of land. 43 CFR 2651.4 (b) provides "[t]o the extent necessary to obtain its entitlement, each eligible village corporation shall select all available lands within the township or townships within which all or part of the village is located, and shall complete its selection from among all other available lands. \* \* \*"

Pursuant to regulations in 43 CFR Part 2650, the State Director is the officer of the United States Department of the Interior who is authorized to make final decisions on behalf of the Secretary on land selections under the Alaska Native Claims Settlement Act, subject to appeal to this Board.

Regulations pertinent to appeals contained in 43 CFR, Part 4, Subpart A, Sec. 4.1, Paragraph (5) are as follows:

*Alaska Native Claims Appeal Board.* The Board considers and decides finally for the Department appeals to the head of the Department from findings of fact or decisions rendered by Departmental officials in matters relating to land selection arising under the Alaska Native Claims Settlement Act (85 Stat. 688), and orders and conducts hearings as necessary; except, the Board shall not consider appeals relating to enrollment of Alaska Natives; and with respect to appeals from Departmental decisions on village eligibility under sec. 11(b) of the Act, decisions of the Board shall be submitted to the Secretary for his personal approval before becoming final. Special regulations applicable to proceedings before the

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Board are continued in Subpart J of this Part.

Procedural regulations are contained in 43 CFR, Part 4, Subpart J, Special Rules Applicable to Alaska Native Claims Settlement Act Hearings and Appeals.

As it appears from the BLM record and the brief of the appellant, the following constitutes the pertinent factual background:

Executive Order No. 6044, dated Feb. 23, 1933, withdrew, among others, the lands in question for "the protection of the fishing rights of the natives."

Executive Order No. 8786, dated June 14, 1941, withdrew and reserved for the use of the Navy these same lands, subject to the withdrawals made by Executive Order No. 6044 for the protection of fishing rights "when such uses will not interfere with naval activities."

In 1968, pursuant to the requirement of the Federal Property and Administrative Services Act, 40 U.S.C. § 471 *et seq.* (1970), the Navy informed BLM of its intention to relinquish these lands. BLM subsequently determined that the subject lands were "not suitable for return to the public domain" and informed the General Services Administration of its decision respecting these lands as "property" under the terms of the definition contained in 40 U.S.C. § 472(d) (1970). GSA concurred with the BLM decision and thereby accepted accountability for these lands. In March of 1968, GSA, pursuant to 40 U.S.C. § 484 (1970), disposed of subject

lands as "surplus property" (*See* 40 U.S.C. § 472(g) (1970)) to private parties by quitclaim deed, "subject to rights contained in Executive Order No. 6044."

Ounalashka contends in its brief that the deeds to the disputed parcels, issued by GSA, were improper in that they failed to provide for aboriginal rights of Alaska Natives as protected by Executive Order No. 6044. Ounalashka asserts that even though these lands were relinquished by the Navy, for whose use they had been withdrawn and reserved by Executive Order No. 8786, they could not properly have been considered surplus property because the Bureau of Land Management should have retained the lands in order to discharge trust responsibilities to the Alaska Natives regarding fishing rights. Ounalashka further contends that the sale in 1968 by GSA must be set aside as the quitclaim deed failed adequately to protect Native fishing rights granted in Executive Order No. 6044.

The State Director, Bureau of Land Management, opposes the jurisdiction of the Board in his answer to appellant's brief, asserting that the Secretary of Interior, and therefore the Board, is without authority to cancel or annul a patent issued by the Department of Interior or by another agency of the United States. It is the position of the Bureau of Land Management that the validity of GSA deeds in the present appeal are beyond the

jurisdiction of the Secretary and the Board.

The Board agrees with the Bureau of Land Management.

To be available for selection by a Village Corporation under sec. 11(a)(1) and sec. 12(a)(1) of ANCSA, lands must be "public lands," defined in sec. 3(e) of ANCSA as follows:

"Public lands" means all Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation, and (2) land selections of the State of Alaska which have been patented or tentatively approved under section 6(g) of the Alaska Statehood Act, as amended (72 Stat. 341, 77 Stat. 223), or identified for selection by the State prior to January 17, 1969;

The appellant does not contest BLM's determination that the subject lands were not suitable for return to the public domain. Upon concurrence of the Administrator of the General Services Administration, however, such a determination transfers the administrative jurisdiction of the lands from the Department of the Interior to GSA. It is the latter agency, and not BLM, which may then determine, as it did in this case, that the transferred lands and improvements, if any, are "surplus property," suitable for disposal.

The sale and disposal by GSA of these lands in Mar. of 1968 by quitclaim deed to private parties, pursuant to the Federal Property and Administrative Services Act and

regulations thereunder, transferred the lands from federal to private ownership. The Government, having deeded away its interest in such lands, cannot now convey them to the appellant.

[1] Lands conveyed to private parties by quitclaim deeds, issued by the General Services Administration pursuant to the Federal Property and Administrative Services Act, 40 U.S.C. § 471 *et seq.* (1970), have ceased to be "Federal lands and interests therein"; are not within the definition of "public lands" in sec. 3(e) of ANCSA; and are, therefore, not available for selection.

As the transfer of administrative jurisdiction described above led to a change in the status and ownership of the lands, so also it brought a change in jurisdiction to adjudicate disputes involving the lands.

[2] Where BLM's determination that lands are "property" not suitable for return to the public domain pursuant to the Federal Property and Administrative Services Act of 1949, *as amended*, 40 U.S.C. § 472 (d) (1970) is not challenged, and the Administrator of the General Services Administration concurs, such determination and concurrence transfer the land from the administrative jurisdiction of the Department of the Interior to that of GSA.

[3] The basis for Ounalashka's appeal is that "protection of the fishing rights of the Natives" granted by Executive Order No.

6044, requires that the sale be set aside and the status of the land as "surplus property" be redetermined. However, the appropriate form for a challenge to the validity of the deeds by which the lands passed into private ownership is a court, and not an administrative body. Issues arising from GSA's disposal of lands as "surplus property" pursuant to the Federal Property and Administrative Services Act, *supra*, are not within the jurisdiction of the Board.

Although the Board does not adjudicate the validity of the quitclaim deeds, finding the matter beyond its administrative jurisdiction, several observations appear relevant to any judicial consideration of the question. It is noted that of the four quitclaim deeds, the land described in Deed Number AA88973 appears to be partially outside the boundaries of the lands to which Executive Order No. 6044 applies, and the lands conveyed by Deed Number AA8976 appear to be entirely outside these boundaries. It is also noted that, as to the question of whether any Federal property interests in the land were retained through the reference in the deeds to Executive Order No. 6044, sec. 4(b) of ANCSA extinguished "any fishing rights that may exist."

NOW THEREFORE, the decision of the Bureau of Land Management #AA-6709-F, dated June 27, 1975, is affirmed.

This represents an unanimous decision of the Board.

JUDITH M. BRADY,  
*Chairman.*

WE CONCUR:

ABIGAIL F. DUNNING,  
*Member of the Board.*

LAWRENCE A. MATSON,  
*Member of the Board.*

### APPEAL OF PORT GRAHAM CORPORATION\*

#### 1 ANCANB 125

Decided September 3, 1976

Appeal from Decision of the Alaska State Director, Bureau of Land Management #AA-6695-A2, dated May 6, 1976, rejecting a land selection application of the Port Graham Corporation filed under secs. 11 and 12 of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1624 (Supp. IV, 1974) as amended, 89 Stat. 1145 (1976).

Decision of the Bureau of Land Management #AA-6695-A2, dated May 6, 1976, affirmed Sept. 3, 1976.

#### 1. Alaska Native Claims Settlement Act: Land Selections: Withdrawals

Lands tentatively approved to the State under the Alaska Statehood Act are withdrawn for village selection by sec. 11(a) (2) of ANCSA. Because sec. 11(a) (2) withdrawals are terminated three years from the date of enactment of ANCSA by sec. 22(h) (2), a village land

\*Not in Chronological Order.

selection filed subsequent to Dec. 18, 1974 for tentatively approved State lands must be rejected.

**APPEARANCES:** John W. Burke, Esq., Office of the Regional Solicitor, on behalf of State Director, Bureau of Land Management; Thomas E. Meacham, Esq., Assistant Attorney General, State of Alaska; Joe P. Josephson, Esq., on behalf of the Port Graham Corporation.

*OPINION BY CHAIRMAN  
BRADY*

*ALASKA NATIVE CLAIMS  
APPEAL BOARD*

The Alaska Native Claims Appeal Board, pursuant to delegation of authority in the Alaska Native Claims Settlement Act, *as amended*, 43 U.S.C. §§ 1601-1624 (Supp. IV, 1974), and implementing regulations in 43 CFR Part 2650, and Part 4, Subpart J, hereby makes the following findings, conclusions, and decision affirming the decision of the State Director, Bureau of Land Management. #AA-6695-A2 (hereinafter referred to as the State Director).

Pursuant to regulations in 43 CFR Part 2650, the State Director is the officer of the United States Department of the Interior who is authorized to make final decisions on behalf of the Secretary on land selections under the Alaska Native Claims Settlement Act, subject to appeal to this Board.

On May 6, 1976, the State Director issued a decision rejecting as unavailable for selection by the

Port Graham Corporation, lands described in T. 12 S., Rs. 14 and 15 W., Seward Meridian. The Decision recites that on Dec. 17, 1975, the Port Graham Corporation selected lands in the above-described townships pursuant to sec. 12(b) of ANCSA, such selections being considered a "second round selection," as distinguished from selections filed under sec. 12(a) of ANCSA which are considered to be first round selections.

The decision further states that the lands in question had been selected by the State of Alaska pursuant to the Alaska Statehood Act (72 Stat. 341, 77 Stat. 223). All of the State applications were filed prior to Jan. 17, 1969, hence tentative approval to these lands has been given the State. Thus, those lands are not considered "public lands" as defined in sec. 3(e) of ANCSA.

The Decision quotes from sec. 12(b) of ANCSA, under which the subject village selection application was made:

\* \* \* Each Village Corporation shall select the acreage allocated to it from the lands withdrawn by subsec. 11(a).

The decision further states that the lands in T. 12 S., Rs. 14 and 15 W., Seward Meridian, were withdrawn by sec. 11(a)(2) of ANCSA and were, at one time, available for selection by the Village of Port Graham. However, the withdrawal made by sec. 11(a)(2) was terminated on Dec. 18, 1974, under the

terms of sec. 22(h) (2) of ANCSA which provides:

The withdrawal of lands made by subsec. 11(a) (2) and sec. 16 shall terminate three years from the date of enactment of this Act.

The decision concludes that, at the time the Port Graham Corporation filed the subject application, the lands were therefore not available for selection, and accordingly the subject village selection application was thereby rejected.

On June 9, 1976, the Port Graham Corporation filed a Notice of Appeal to the decision of the State Director rejecting the Port Graham Village Selection, and subsequently, on July 12, 1976, filed a Statement of Standing and Reasons for Appeal.

The appellant, Port Graham Corporation, contends that the Decision appealed from erred in holding that the land selected in T. 12 S., Rs. 14 and 15 W., Seward Meridian, were withdrawn by sec. 11 (a) (2) of ANCSA. Quoting from Appeal of English Bay Corporation, 1 ANCAB 35, 83 I.D. 454 (1976), at p. 457, appellant states that:

T. 12 S., R. 14 W., and T. 12 S., R. 15 W., of the Seward Meridian are by description within the tiers of townships described in Section 11(a) (1) (B) and (C) in relation to the townships within which the Village of Port Graham Corporation is located.

Appellant contends that the Decision is also in error for concluding that the withdrawal of T. 12 S., Rs. 14 and 15 W., Seward Meridian

was terminated on Dec. 18, 1974, by sec. 22(h) (2) of ANCSA. Therefore, the decision appealed from was in error for concluding that the lands applied for and which are the subject of this appeal "were not available for selection" when the Port Graham Corporation filed the subject application. Appellant contends that even if the lands in question had been withdrawn under sec. 11(a) (2) of ANCSA, said lands remained available for selection by the appellant under sec. 12(b) of ANCSA notwithstanding that provision of sec. 22(h) (2). Appellant contends that sec. 22(h) (2) must be read in conjunction with sec 12(b) which permits a village corporation to make second round selections from acreage allotted to it "from the lands withdrawn by subsecs. 11(a), 12(b) making no distinction for that purpose between withdrawals under secs. 11 (a) (1) and 11(a) (2)" [sic.]

The brief filed by the Regional Solicitor's Office on behalf of the State Director, adopted and reaffirmed by the State of Alaska in its response, states that appellant's contention that the particular parcels of land were withdrawn by sec. 11(a) (1) is incorrect. As noted by the Board in *English Bay, supra*, at p. 457:

T. 12 S., R. 14 W., AND T. 12 S., R. 15 W., of the Seward Meridian are *by description* within the tiers of townships described in Section 11(a) (1) (B) and (C) in relation to the townships within which the Village of Port Graham Corporation is located. (*Italics added*).

The State Director points out that, in *English Bay*, the Board did not conclude that these townships were withdrawn by secs. 11(a) (1) (B) and (C), but merely within that same description of lands. Because these townships have been selected by and tentatively approved to the State, they are not public lands as defined by sec. 3(e) (2) and could not have been withdrawn by sec. 11(a) (1). They are instead withdrawn for selection purposes by sec. 11(a) (2). Lands withdrawn by sec. 11(a) (2) are subject to sec. 22(h) (2) which specifically requires that the lands be selected by Dec. 18, 1974. Because the Port Graham Corporation did not select the lands in question by Dec. 18, 1974, the appellant cannot now assert that sec. 12(b) controls over sec. 22(h) (2).

[1] The Board agrees with the reasoning contained in the State Director's decision and the brief filed in support thereof by the Regional Solicitor. Under sec. 12(b), village corporations are entitled "to select the acreage allotted to it from the lands withdrawn by subsec. 11(a)." The lands in question have been tentatively approved to the State and cannot be considered "public lands" as defined by sec. 3(e), since such lands may be withdrawn for village selection only under the terms of sec. 11(a) (2). Because sec. 22(h) (2) specifically terminates all sec. 11(a) (2) withdrawals three years from date of enactment and the lands in question were not selected prior to the Dec. 18, 1974 deadline, they are no longer

available for selection by the Port Graham Corporation.

NOW THEREFORE, the decision of the Bureau of Land Management # AA-6695-A2, dated May 6, 1976, is affirmed.

JUDITH M. BRADY,  
*Chairman.*

WE CONCUR:

LAWRENCE MATSON,  
*Member of the Board.*

ABIGAIL F. DUNNING,  
*Member of the Board.*

## APPEAL OF EYAK CORPORATION\*

### 1 ANCANB 132

Decided September 9, 1976

Appeal from the Decision of the Alaska State Director, Bureau of Land Management #AA-8447-A, dated Mar. 6, 1975, rejecting in part a land selection application of Eyak Corporation, as amended, under sec. 12 of ANCSA, 43 U.S.C. §§ 1601-1624 (Supp. IV, 1974), as amended, 89 Stat. 1147 (1976).

Decision of the Bureau of Land Management #AA-8447-A, dated Mar. 6, 1975, affirmed in all matters except reversed as to rejection of land selection therein described as N $\frac{1}{2}$  SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Sec. 32, T. 15 S., R. 3 W., of Copper River Meridian.

### 1. Alaska Native Claims Settlement Act: Land Selections: Proof

The data upon which BLM has relied as the basis for compiling a protraction

\*Not in Chronological Order.

diagram will be deemed sufficient to determine boundaries of lands affected by the provisions of sec. 22(1) of ANCSA unless controverted by specific showing of error.

**2. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Administrative Procedure: Decisions**

ANCAB is bound by the rules and regulations promulgated by the Secretary of the Interior pursuant to sec. 25 of ANCSA.

**3. Alaska Native Claims Settlement Act: Land Selections: Generally**

Where an unlisted Native village qualified under sec. 11(b)(3) of ANCSA is subsequently annexed by a first class or home-rule city, which is not a Native village, such village does not by reason of such annexation become one and the same as the city so as to enable selection of land under 43 CFR 2650.6(a).

**4. Alaska Native Claims Settlement Act: Land Selections: Survey**

Pursuant to provisions of sec. 13 of ANCSA and regulations in 43 CFR 2650.5, selection of lands shall be in conformance with the United States Survey System. Therefore, those provisions which apply to the rectangular system of surveys as provided in 43 U.S.C. §§ 751-774 (1970), are applicable to selection made under ANCSA.

The smallest legal subdivision authorized pursuant to the rectangular system of surveys of the public lands, 43 U.S.C. §§ 751-774 (1970), is a quarter quarter section.

Unless all of the smallest legal subdivision, i.e.,  $\frac{1}{4}$ - $\frac{1}{4}$  of section, is within the prohibited two mile distance from the city boundary, BLM shall not reject said land for selection as being contrary to provisions of sec. 22(1) of ANCSA.

**5. Alaska Native Claims Settlement Act: Land Selections: Generally**

Provision of sec. 12(a)(2) of ANCSA and regulations in 43 CFR § 2651.4(b) requiring selections to be "contiguous and in reasonably compact tracts," is limited to lands that are otherwise available for selection under ANCSA and has no application so as to make available lands which are prohibited from being selected under provisions of sec. 22(1) of ANCSA.

**APPEARANCES:** Joe P. Josephson, Esq. and Howard S. Trickey, Esq., on behalf of Eyak Corporation; John W. Burke, Esq. and Harold Kip Wells, Esq., Office of the Regional Solicitor, on behalf of State Director, Bureau of Land Management; James N. Reeves, Esq., Assistant Attorney General, on behalf of State of Alaska.

*OPINION BY CHAIRMAN  
BRADY*

*ALASKA NATIVE CLAIMS  
APPEAL BOARD*

The Alaska Native Claims Appeal Board, pursuant to delegation of authority in the Alaska Native Claims Settlement Act, *as amended*, 43 U.S.C. §§ 1601-1624 (Supp. IV, 1974) ANCSA, and implementing regulations in 43 CFR Part 2650 and Part 4, Subpart J, hereby makes the following findings, conclusions, and decision rejecting in part and affirming in part the decision of the State Director, Bureau of Land Management #AA-8447-A (hereinafter referred to as BLM).

Pursuant to regulations in 43 CFR Part 2650, the State Director is the officer of the United States Department of the Interior who is authorized to make final decisions on behalf of the Secretary on land selections under the Alaska Native Claims Settlement Act, subject to appeal to this Board.

On Mar. 6, 1975, the State Director issued a decision rejecting in part as unavailable for selection by Eyak Corporation lands therein described located within T. 15 S., R. 3 W., Copper River Meridian. The Decision recites that on Nov. 27, 1974, the Village of Eyak filed Selection Application #AA-8447-A, pursuant to sec. 12 of ANCSA, 85 Stat. 688. The application was amended on Dec. 11 and 16, 1974. The application is for land in the village core township, T. 15 S., R. 3 W., Copper River Meridian. Said Decision made findings summarized as follows:

That the Dec. 16, 1974, amendment selected lands located within two miles of the boundary of the City of Cordova, which is a home-rule city. Sec. 22(1) of ANCSA prohibits such selection as do Departmental Regulations 43 CFR Part 2650.6(a) which states:

Notwithstanding any other provisions of the act, no village or regional corporation may select lands which are within 2 miles from the boundary of any home rule or first-class city \* \* \* as the boundaries existed and the cities were classified on Dec. 18, 1971, \* \* \*.

For the above-given reasons, the village selection application, as

*amended*, is rejected as to the following described lands:

Land within sec. 23, 24, 25, 26, and 32, located within T. 15 S., R. 3 W., Copper River Meridian.

Appellant, Eyak Corporation, asserts in its Notice of Appeal filed Apr. 9, 1975, and in Memorandum in Support of Appeal filed May 12, 1975, that the matters in dispute and issues raised in this appeal are as follows:

1. The actual location of the municipal boundaries of the City of Cordova on Dec. 18, 1971.

2. The actual distance of the parcels rejected from the former municipal boundaries of the City of Cordova as existing on Dec. 18, 1971.

3. That the above issues of fact were erroneously determined by the BLM Decision being appealed.

4. That the decision of the BLM on Mar. 6, 1975, is inconsistent with prior administrative practice. The decision of the BLM on Mar. 6, 1975, errs in its application of sec. 22(1) of ANCSA in that the two mile buffer zone intended to be created has not been properly calculated and further that application was not intended to apply to an island such as Mavis Island, which is part of the lands subject to this appeal.

5. Eyak Corporation, for the purposes of sec. 22(1) and 43 CFR Part 2650.6, falls within the exception provided by the regulations cited in that the organizers are themselves residents of the City of Cordova and were residents at the time of organization. The Natives are

therefore "of a community which is itself a first class or home rule city" within the term of the explicit exception provided by 43 CFR Part 2650.6.

6. That the decision of BLM of Mar. 6, 1975, contravenes sound administration of ANCSA and the intent of Congress in that it would leave a small tract in Sec. 32 isolated and in addition would not be in compliance with the intent to have selected bodies be made available which are contiguous and reasonably compact tracts.

A brief filed on Nov. 24, 1975, by the Regional Solicitor's Office on behalf of BLM, generally asserts:

1. That the evidence relied upon by BLM was sufficient to sustain the decision that the lands in question were not available for selection under provision of sec. 22(1) of ANCSA;

2. That the burden is on the appellant in this matter to offer and present evidence to show why the BLM Decision is not sustained by the evidence; and

3. That there is no ambiguity in the provisions of sec. 22(1) of ANCSA and the regulations promulgated pursuant thereto in 43 CFR Part 2650.6 as applied to the evidence which was before Bureau of Land Management and before this Board on appeal.

Answering brief filed Nov. 25, 1975, by the State of Alaska in support of the decision by BLM and in response to the assertions of Appellant's Statement of Reason, variously asserts:

1. That the State of Alaska owns Mavis Island inasmuch as it was acquired under sec. 6(a) of Alaska Statehood Act, pursuant to classification as public recreation land, under 11 Alaska Administrative Code 52.010. Further, that the premises have been leased pursuant to A.S. 38.05.315 to a third party whose interest is entitled to be protected under sec. 14(c)(2) of ANCSA.

2. That BLM's decision that the lineal distance between the lands involved in this appeal and the city boundary was based on sufficient facts to implement sec. 22(1) of ANCSA in determining that the land in question is not available for selection. Appellant cites no instance before the Board in which said factual material results in an erroneous decision.

3. There is no basis in fact to support appellant's contention that Eyak Corporation is entitled to be considered as an exception described in 43 CFR Part 2650.6(a).

Appellant, Eyak Corporation, in its reply memorandum filed on Jan. 7, 1976, reasserts that BLM has the burden of producing reliable and clear evidence to establish the prima facie case and that the evidence upon which the BLM decision was based fails to meet this burden. Appellant further contends that inasmuch as the Village of Eyak lies entirely within the city limits of Cordova, that the Board, in exercising its authority, must obtain whatever additional information is necessary in order to determine

whether or not a factual situation exists which would necessitate compliance with 43 CFR Part 2650.6 (a).

On Jan. 12, 1976, the Board by Order stated that at the conclusion of a conference held by the Board on Jan. 7, 1976, at which all named necessary parties to this appeal were present, with the single exception of the City of Cordova, the following facts were mutually agreed upon and stipulated:

1. That the City of Cordova was a first class or home-rule city on Dec. 18, 1971.

2. That on Jan. 8, 1972, the City of Cordova annexed an area which includes the Native village of Eyak which prior to that time had been outside the boundaries of the City of Cordova.

3. That the boundaries of the north addition annexation to the City of Cordova are not relevant to the issues in dispute in this appeal.

4. That the south addition and the city dock addition boundaries are not relevant to the issue whether or not Mavis Island is within two miles of the City of Cordova.

5. That the boundary of the south addition annexation to the City of Cordova is the only boundary relevant to the question of whether or not the spit, located in Section 32, is within two miles of the City of Cordova.

Appellant, Eyak Corporation, on Jan. 22, 1976, filed a stipulation, the contents of which are incorporated in an Order of the Board, dated Feb. 9, 1976, in which the

protraction method of computation as used by the cadastral engineer in locating Cordova's boundary is deemed to be accurate. By stipulation filed Feb. 20, 1976, the Regional Solicitor's Office, on behalf of BLM, filed a stipulation to the contents of the Order of the Board above referred to, dated Feb. 9, 1976, as being correct.

On Mar. 8, 1976, appellant, Eyak Corporation, caused to be filed with the Board the results of an independent survey made pursuant to issues raised in this appeal pertaining to the location of the land described as Mavis Island in relation to the existing boundary of the City of Cordova on the date of enactment of ANCSA.

By Order dated Apr. 28, 1976, the Board closed the record to all filings pertaining to this appeal and deemed the record to be complete and ready for decision.

There are no issues raised in this appeal regarding standing of any party before this Board in this matter or any procedural issues which are determinative of this appeal. The lands involved in this appeal are:

1. Those portions of Sec. 23, 24, 25, and 26 of T. 15 S., R. 3 W., Copper River Meridian, which comprise what is commonly known as Mavis Island situated in Eyak Lake; and

2. That portion of Sec. 32 within the same township which lies within SW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ , SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  and the N $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ .

Pursuant to the above-noted stipulations entered into as set out in Orders of the Board on Jan. 7 and

Feb. 9, 1976, appellant, Eyak Corporation, proceeded to obtain additional factual information in relation to the location of Mavis Island from the nearest relevant boundary of the City of Cordova.

The appellant, Eyak Corporation, engaged Mr. John L. Joslin, a registered professional land surveyor, to make an on-site survey of the distance from the relevant boundary of the City of Cordova, as stipulated to by the parties, to Mavis Island which includes all of those lands located within Sec. 23, 24, 25 and 26 described in the State Director, BLM's Decision, and which are the subject of this appeal. The documents furnished to the Board and made a part of this appeal filed by the appellant, Eyak Corporation, conclude that the entire island is less than two miles distance from the city boundary of the City of Cordova as existing as of the date of ANCSA.

Based on this information, it is the decision of the Board that those lands described in the BLM Decision as being located within Sec. 23, 24, 25 and 26, T. 15 S., R. 3 W., of the Copper River Meridian, otherwise known as Mavis Island, are located within two miles distance from the boundary of the City of Cordova and therefore are not available for selection by Eyak Village Corporation under terms of sec. 22(1) of ANCSA.

[1] It is the contention of appellant, Eyak Corporation, that the record file in this appeal does not disclose a sufficient factual basis for

the decision made by BLM to reject for selection lands therein described which would enable this Board to affirm that decision. In essence, appellant's contention is that in the absence of an accurate on-site survey, the BLM's Decision placed an unjustified reliance upon other information which is not only inaccurate but is too indefinite to support the rejection for selection of those lands under appeal.

"Protraction diagram" is defined in 43 CFR 2650-5(1), as follows:

\* \* \* means the approved diagram of the Bureau of Land Management mathematical plan for extending the public land surveys and does not constitute an official Bureau of Land Management survey, and, in the absence of an approved diagram of the Bureau of Land Management, includes the State of Alaska protraction diagrams which have been authenticated by the Bureau of Land Management.

The record file of this appeal, insofar as it pertains to the issue of determining the location of those lands rejected within Sec. 32 as being within two miles of the nearest relevant boundary line of the City of Cordova, includes; (1) documentation from the Bureau of Land Management which includes the factual information obtained and utilized in making this determination, (2) a stipulation entered into by the appellant, Eyak Corporation, that the protraction method of computation used in locating Cordova's boundary by the BLM is both the agreed method of computation and also is a correct method

of measurement for the purpose of determining boundaries, (3) the revised BLM status maps upon which are plotted the location of the relevant portions of the City of Cordova indicating the boundary line as well as the plotting of those portions of Sec. 32 at issue. Upon BLM having determined that information used to compile a protraction diagram is sufficient to locate relevant boundaries, and in the absence of any contention or showing by appellant of particular error or unreliability, there is no compelling reason to set aside a decision based on such information. Based upon the above-mentioned documents, and stipulation of the parties, it is the determination of the Board that the State Director, BLM has sufficiently met the burden of establishing a prima facie case that those portions of Sec. 32 which lie within the lands described as the SW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ , SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  and the N $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$  are within a two mile distance from the nearest relevant boundary of the City of Cordova and are therefore not available for selection pursuant to provisions of sec. 22(1) of ANCSA.

[2] The State of Alaska contends that this Board is without authority to consider whether or not appellant, Eyak Corporation, is qualified to come within the exception under the regulations of 43 CFR 2650.6(a) which would allow selection within the two mile limitation, notwithstanding, the language of sec. 22(1) of ANCSA, which is a complete prohibition to any selec-

tion within that distance. Further, the State contends that the above-quoted regulations are so clearly in contradiction to sec. 22(1) of ANCSA as to be beyond the authority of this Board to consider.

This Board is bound to accept the provisions of the above regulations.<sup>1</sup> It would be beyond the jurisdiction of the Board to resolve any issues of the conflict, if any, between the provisions of ANCSA and these regulations promulgated pursuant to sec. 25 of ANCSA.

[3] As previously noted, appellant, Eyak Village Corporation contends that if it should be found that any of the lands described in the BLM decision are within the two mile limitation as prescribed by sec. 22(1) of ANCSA, that selection of those lands would not be prohibited inasmuch as the Village Corporation comes within the exception in 43 CFR 2650.6(a) which in pertinent part is as follows:

\* \* \* except that a village corporation organized by Natives of a community which is itself a first class or home-rule city is not prohibited from making selections within 2 miles from the boundary of that first class or home-rule city, unless such selections fall within 2 miles from the boundary of another first class or home-rule city which is not itself a Native village or within 6 miles from the boundary of Ketchikan.

In support of this argument, that appellant qualifies under the provisions of the exception, it is stated in pertinent part as follows:

<sup>1</sup> An administrative agency is bound by its own rules and regulations. *United States Ex rel Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

\* \* \* The organizers of Eyak are residents of the City of Cordova, and were residents at the time of incorporation. There have been close ties between the village of Eyak and the City of Cordova for many years and many of the Eyak corporation organizers have played an active part in the functioning of the city as a body politic. The village of Eyak is entirely included within the city limits of Cordova. Thus, there are not only geographical, but historical and cultural bonds between the organizers and members of Eyak Corporation and the City of Cordova. (Statement of Reasons, May 12, 1975.)

As previously noted parties to this appeal have stipulated: (1) that the City of Cordova was a first class or home-rule city within the meaning of this issue as of Dec. 18, 1971; and (2) that the Native Village of Eyak was outside the boundaries of the City of Cordova, until Jan. 8, 1972, when the City of Cordova annexed the area which included the Native Village of Eyak.

The issue thus raised by appellant is whether the decision of BLM rejecting their application for selection of lands within the prohibition described in sec. 22(1) of ANCSA, must be reversed inasmuch as the Eyak Corporation comes within the defined exception in 43 CFR 2650.6(a).

By Order of this Board on Dec. 10, 1974, which was approved by the Secretary of Interior on Dec. 17, 1974, it was found that the Native Village of Eyak met the necessary requirements for eligibility as an unlisted Native village pursuant to sec. 11(b)(3) of ANCSA, 43

U.S.C. §1610(b)(3), and the regulations promulgated in 43 CFR Part 2650.

The Board's determination that Eyak qualified as an unlisted village was based on the following findings:

1. That the Village of Eyak on April 1, 1970, consisted of "community" within the meaning of the definition of "Native village" in §3(c) of ANCSA 43 U.S.C. §1602(c).
2. That the Native Village of Eyak did have on April 1, 1970, an identifiable physical location within the area known as "Oldtown" adjacent to Cordova.
3. That the Native Village of Eyak, on April 1, 1970, was distinct from the City of Cordova.
4. That the Native Village of Eyak, on April 1, 1970, was not modern and urban in character, within the meaning of the regulations in 43 CFR § 2651.2b(3).
5. That a majority of the residents of the Native Village of Eyak, on April 1, 1970, were "Natives" enrolled pursuant to § 3(b) and § 5 of ANCSA, 43 U.S.C., § 1602(b) and § 1604.

Thus, it was concluded that as of Apr. 1, 1970, the Native Village of Eyak was eligible for benefits provided by ANCSA. Such a findings necessarily determined within the meaning of 43 CFR 2651.2(b)(2), (3) and (4), that Eyak was essentially a "separate" community from the City of Cordova. Factual findings not supporting such a conclusion would have denied eligibility to Eyak as a Native village under ANCSA.

The very contentions now being asserted by appellant to demonstrate that Eyak is one and the same community as the home-rule City of Cordova, are among the basic fac-

tors which would have denied the quality of separateness necessary to qualify Eyak as an unlisted Native village under ANCSA.

The Board recognizes that the determination of eligibility of a Native village is a finding and conclusion reached under terms of ANCSA and 43 CFR 2651.2(b) (2) and (4) as of Apr. 1, 1970, while the provisions of 43 CFR 2650.6(a) require a factual determination to be made as of Dec. 18, 1971.

As previously noted, the parties to this appeal stipulated that the Native Village of Eyak was outside the boundaries of the City of Cordova until annexed to the city on or about Jan. 8, 1972. While annexation is an act of extending the boundaries of a municipal government for whatever mutual benefits result to participants, it does not follow that annexation results in a complete alteration of the characteristics of the total "community." In short, the City of Cordova did not thereby become a first class or home-rule city organized by "Natives" within meaning of the provision for an exception as described in 2650.6(a) of ANCSA, solely because Eyak was annexed.

The exception described in 43 CFR 2650.6(a), in the opinion of the Board, was intended to take cognizance of a factual circumstance wherein the community of a Native Village Corporation is essentially one and the same as community of the municipality being comprised of a majority of Native residents and being also a first class

or home-rule city as of Dec. 18, 1971. The necessity of Natives constituting a majority of residents of such a community as of Apr. 1, 1970, would be required for qualification as an unlisted Native village under ANCSA.

The date of actual formation of Eyak Village Corporation for purpose of obtaining benefits under ANCSA is of no significance insofar as determining whether or not this exception applies. In essence, the situation covered by this exception is not that the Native Corporation came into existence after it was in fact a legal part of the first class or home-rule City of Cordova, but rather that the Natives of a community being qualified as a Native Corporation, also comprise the city itself.

To effectuate the result proposed by appellant in construing this exception to be applicable to the Native Village of Eyak, would be a result specifically opposed to sec. 11(b)(3)<sup>2</sup> in that Eyak Corporation would be thus taking on the character of being a "community" one and the same as a first class city and thereby being authorized to se-

<sup>2</sup> Section 11(b)(3): "Native villages not listed in subsec. (b)(1) hereof shall be eligible for land and benefits under this Act and lands shall be withdrawn pursuant to this sec. if the Secretary within two and one-half years from the date of enactment of this Act, determines that—

"(A) twenty-five or more Natives were residents of an established village on the 1970 census enumeration date as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance; and

"(B) the village is not of a modern and urban character, and a majority of the residents are Natives."

lect lands within two miles of such city which is both modern and urban in character and in which the majority of residents are non-Native. This characterization is completely inconsistent with the character of Eyak as a Native village, separate and distinct from the City of Cordova.

For the above reasons, it is concluded by the Board that Eyak Native Village Corporation does not meet the stated criteria of this exception described in 43 CFR 2650.6 (a) which would enable selection of lands within two miles of the boundary of the first class or home-rule City of Cordova under the terms of sec. 22(1) of ANCSA.

[4] It is further alleged by appellant, Eyak Corporation, that BLM's decision as to the described lands rejected in Sec. 32, is inconsistent with prior administrative practice. Specifically, it is argued that the inconsistency involves a misapplication of policy by the Bureau of Land Management in not allowing selection to be made in aliquot parts even if a portion of that selected part is within the two mile zone if the major portion of the land mass selected is outside the zone. In the briefing filed in this appeal, neither the Office of the Regional Solicitor on behalf of the State Director, BLM, nor the Attorney General on behalf of the State of Alaska, refer to this contention by the appellant.

The initial application filed by the Village of Eyak for selection on Nov. 27, 1974, did not include any lands situated within Sec. 32.

amended application filed on Dec. 11, 1974, was for the following described lands: T. 15 S., R. 3 W., Copper River Meridian, Sec. 32 and herein described by aliquot parts of the Sec. by capital letter and fractions as follows: S  $\frac{1}{2}$  SW  $\frac{1}{4}$  SW  $\frac{1}{4}$ ; all uplands. The application as again amended on Dec. 16, 1974, added lands described as follows:

T 15 S—R 3 W, CRM

Section 23: SE  $\frac{1}{4}$  SE  $\frac{1}{4}$  SE  $\frac{1}{4}$ ; All uplands

Section 24: SW  $\frac{1}{4}$  SW  $\frac{1}{4}$ ; All uplands

Section 25: N  $\frac{1}{2}$  NW  $\frac{1}{4}$  NW  $\frac{1}{4}$ ; All uplands excl. AA-5880

Section 26: E  $\frac{1}{2}$  NE  $\frac{1}{4}$  NE  $\frac{1}{4}$ ; All uplands

Section 32: SW  $\frac{1}{4}$  NE  $\frac{1}{4}$  SW  $\frac{1}{4}$ , SE  $\frac{1}{4}$  NW  $\frac{1}{4}$  SW  $\frac{1}{4}$ , N  $\frac{1}{2}$  SW  $\frac{1}{4}$  SW  $\frac{1}{4}$ ; All uplands

Sec. 13(b) of ANCSA recites as follows:

All withdrawals, selections, and conveyances pursuant to this Act shall be as shown on current plats of survey or protraction diagrams of the Bureau of Land Management, or protraction diagrams of the Bureau of the State where protraction diagrams of the Bureau of Land Management are not available, and shall conform as nearly as practicable to the United States Land Survey System.

43 CFR 2650.5-1 (a) Survey Requirements, General:

Selected areas are to be surveyed as provided in sec. 13 of the act. Any survey or description used as a basis for conveyance must be adequate to identify the lands to be conveyed.

The rectangular system of surveys of the public lands was established by Congress in 1796 (43 U.S.C. § 751-774 (1970)). The

smallest subdivisions mentioned by Congress are the "quarter quarter sections," *i.e.* 40 acres (43 U.S.C. § 753 (1970)). And the long established rule of the Department is that the quarter quarter section, with a fractional lot, is ordinarily the minimum unit of land for classification and disposal. *Jacob N. Wasserman*, 74 ID 392 (1967), *Robert P. Kunkel*, 74 ID 373 (1967).

In the Bureau of Land Management's glossary of public land terms, 1959 Ed., are found pertinent definitions of:

A "legal subdivision" is defined as:

In a general sense, a subdivision of a township such as a section, quarter section, lot, etc., which is authorized under the public land laws; in a strict sense, a regular subdivision.

A "regular subdivision" is defined as:

Generally speaking, a subdivision of a section which is an aliquot part of 640 acres, such as a half section of 320 acres, quarter section of 160 acres and quarter quarter section of 40 acres.

Finally, a "smallest legal subdivision" is defined as:

For general purposes under the public land laws, a quarter quarter section. Under certain of these laws and under special conditions, applicants, claimants, etc., can select subdivisions smaller than a quarter quarter section.

As noted, the glossary defines smallest legal subdivision as a quarter quarter section. This interpretation of the smallest legal subdivision as a quarter quarter section is sustained in both judicial and administrative cases. It was so defined

by the Supreme Court of the United States in *Warren v. Van Brunt*, 86 U.S. (19 Wall.) 646, 652 (1873), where it was stated that "there is no legal subdivision of the public lands less than a quarter of a quarter section or 40 acres, except in the cases of fractional sections."

Further division by description of aliquot parts of a section has been permitted only where peculiar conditions have required otherwise, or where Congress has specially provided otherwise (*see Robert Ray Spencer, State of Arizona*, 53 I.D. 149 (1930), and matters cited therein).<sup>3</sup> There has been no contention by appellant or showing from an examination of the record of this appeal that either a Congressional Act or a regulation from the Department of Interior is applicable insofar as authorizing any deviation from the application of principles of the rectangular public land survey system in this matter. The effect of the above is that section subdivisions must be designated in the same manner as that in which subdivisions are designated for larger subdivision of sections, *i.e.*, in terms of aliquot portions of the subdivisions. Inasmuch as application had been made for what was therein described as the S $\frac{1}{2}$  and also the N $\frac{1}{2}$  of the SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Sec. 32, such, in fact, comprises the SW $\frac{1}{4}$  of the SW $\frac{1}{4}$  of that Sec. The effect of the BLM decision by not describing that quarter quarter

<sup>3</sup> Examples of Congressional directions to the contrary may be found in the Placer and Lode Mining Laws (30 U.S.C. 1946 Ed. Chap. 2), and in the Small Tract Act.

section in an authorized manner was to permit rejection of a portion thereof by utilizing a further unauthorized subdivision *i.e.*, ( $N\frac{1}{2}SW\frac{1}{4}SW\frac{1}{4}$ ) and thereby to reject a portion of the quarter quarter section while allowing selection and approval of the balance of that same quarter quarter section. For the above reasons, since application was made for land which comprises the  $SW\frac{1}{4}SW\frac{1}{4}$  of Sec. 32, it cannot be further divided by description of aliquot parts for purposes of determination of selectability under the terms of ANCSA.

By describing selected lands affected by provisions of sec. 22(1) of ANCSA as "lands which are within two miles from the boundary," description must be limited to the smallest aliquot part of the Section permitted. Thus, it is determined by the Board that unless all of the smallest legal subdivision, *i.e.*,  $\frac{1}{4}-\frac{1}{4}$  of a Sec., is situated within the prohibited two mile distance, BLM cannot reject an application for selection as being contrary to sec. 22(1) of ANCSA.

For the above reasons, it is the decision of this Board that State Director, BLM's decision in which rejection was made of land described as the  $N\frac{1}{2}SW\frac{1}{4}SW\frac{1}{4}$  of Sec. 32 is hereby reversed. It is further the determination of this Board that inasmuch as a portion of the allowed subdivision description, the  $SW\frac{1}{4}SW\frac{1}{4}$  of Sec. 32, lies outside of the two mile prohibited distance from the nearest relevant

boundary line of the City of Cordova, that all of said subdivision must be allowed for selection by Eyak Corporation.

[5] It is further the contention of appellant, Eyak Corporation, that those small portions of land which lie within the  $NE\frac{1}{4}SW\frac{1}{4}$  and also within the  $NW\frac{1}{4}SW\frac{1}{4}$  of Sec. 32, unless allowed to be included for selection along with lands located in the  $SW\frac{1}{4}SW\frac{1}{4}$  of the same section, that such rejection would result in such a small area being isolated in contradiction to the concept and policy of ANCSA, in that all selected lands need to be within a compact and contiguous tract. The portion of ANCSA dealing with the requirement of village corporation selections being compact and contiguous is in sec. 12(a)(2) and in regulations located in 43 CFR 2651.4. A reading of this section of ANCSA and the applicable rule makes clear that these conditions apply only to lands that are in fact, and which have been determined to be actually available for selection by the Native corporation. The status of the described lands in this instance are that they are situated wholly within a prohibited area under a specific provision of ANCSA and are thereby unavailable for selection.

In summary, pursuant to the authority delegated to the Alaska Native Claims Appeal Board by the Secretary of the Interior, 43 CFR 4.901, the Decision of the Alaska State Director, Bureau of Land Management # AA-8447-A,

rejecting in part, appellant's application of lands described in T. 15 S., R. 3 W., Copper River Meridian, and the subject of this appeal, is for reasons given in the foregoing decided as follows:

Affirmed as to lands described within Secs. 23, 24, 25 and 26 (commonly known as Mavis Island); and

Affirmed as to lands described therein as SW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  and SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Sec. 32; and

Reversed as to lands described therein as the N $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Sec. 32.

This represents an unanimous decision of the Board.

JUDITH M. BRADY,  
*Chairman.*

WE CONCUR:

ABIGAIL F. DUNNING,  
*Member of the Board.*

LAWRENCE A. MATSON,  
*Member of the Board.*

#### APPEAL OF WISENAK, INC.\*

1 ANCAB 157

Decided September 15, 1976

Appeal from the Acting Chief Adjudicator for the Alaska State Director, Bureau of Land Management #F-19749, dated May 9, 1974, rejecting an application for a Native group selection filed under sec. 14(h) of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1624

\*Not in Chronological Order.

(Supp. IV, 1974), as amended, 89 Stat. 1145 (1976).

The Decision of the Bureau of Land Management #F-19749, dated May 9, 1974, affirmed Sept. 15, 1976.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Board: Appeals: Jurisdiction

The Alaska Native Claims Appeal Board does not have jurisdiction to adjudicate the Secretary's authority to withdraw and reserve public lands for a utility and transportation corridor within the meaning of sec. 17(c) of the Alaska Native Claims Settlement Act.

2. Alaska Native Claims Settlement Act: Land Selections: Generally—Alaska Native Claims Settlement Act: Withdrawals: Generally

A withdrawal of public lands for a utility and transportation corridor under sec. 17(c) of the Alaska Native Claims Settlement Act, subject to valid existing rights, precludes selection of those lands by a Native group under sec. 14(h) of the Alaska Native Claims Settlement Act.

APPEARANCES: John W. Burke, Esq., Office of the Regional Solicitor, on behalf of State Director, Bureau of Land Management; William H. Timme, Esq., on behalf of Wisenak, Inc., and Doyon, Ltd.

OPINION BY CHAIRMAN  
BRADY

#### ALASKA NATIVE CLAIMS APPEAL BOARD

The Alaska Native Claims Appeal Board pursuant to delegation of authority in the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. §§ 1601-1624 (Supp. IV, 1974), and implementing regula-

rejecting in part, appellant's application of lands described in T. 15 S., R. 3 W., Copper River Meridian, and the subject of this appeal, is for reasons given in the foregoing decided as follows:

Affirmed as to lands described within Secs. 23, 24, 25 and 26 (commonly known as Mavis Island); and

Affirmed as to lands described therein as SW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  and SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Sec. 32; and

Reversed as to lands described therein as the N $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Sec. 32.

This represents an unanimous decision of the Board.

JUDITH M. BRADY,  
*Chairman.*

WE CONCUR:

ABIGAIL F. DUNNING,  
*Member of the Board.*

LAWRENCE A. MATSON,  
*Member of the Board.*

# APPEAL OF WISENAK, INC.\*

1 ANCAB 157

Decided September 15, 1976

Appeal from the Acting Chief Adjudicator for the Alaska State Director, Bureau of Land Management #F-19749, dated May 9, 1974, rejecting an application for a Native group selection filed under sec. 14(h) of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1624

\*Not in Chronological Order.

(Supp. IV, 1974), as amended, 89 Stat. 1145 (1976).

The Decision of the Bureau of Land Management #F-19749, dated May 9, 1974, affirmed Sept. 15, 1976.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Board: Appeals: Jurisdiction

The Alaska Native Claims Appeal Board does not have jurisdiction to adjudicate the Secretary's authority to withdraw and reserve public lands for a utility and transportation corridor within the meaning of sec. 17(c) of the Alaska Native Claims Settlement Act.

2. Alaska Native Claims Settlement Act: Land Selections: Generally—Alaska Native Claims Settlement Act: Withdrawals: Generally

A withdrawal of public lands for a utility and transportation corridor under sec. 17(c) of the Alaska Native Claims Settlement Act, subject to valid existing rights, precludes selection of those lands by a Native group under sec. 14(h) of the Alaska Native Claims Settlement Act.

APPEARANCES: John W. Burke, Esq., Office of the Regional Solicitor, on behalf of State Director, Bureau of Land Management; William H. Timme, Esq., on behalf of Wisenak, Inc., and Doyon, Ltd.

OPINION BY CHAIRMAN  
BRADY

## ALASKA NATIVE CLAIMS APPEAL BOARD

The Alaska Native Claims Appeal Board pursuant to delegation of authority in the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. §§ 1601-1624 (Supp. IV, 1974), and implementing regula-

*September 15, 1976*

tions in 43 CFR Part 2650 and Part 4, Subpart J, hereby makes the following findings, conclusions, and decision, affirming the decision of the State Director, Bureau of Land Management #F-19749 (hereinafter referred to as the State Director).

Pursuant to regulations in 43 CFR Part 2650, the State Director is the officer of the United States Department of the Interior who is authorized to make final decisions on behalf of the Secretary on land selections under the Alaska Native Claims Settlement Act, subject to appeal to this Board.

On May 9, 1974, the Acting Chief Adjudicator for the State Director issued a decision rejecting as unavailable for selection by Wisenak, Inc., lands described in Ts. 30 and 31 N., Rs. 11 and 12 W., Fairbanks Meridian. The decision states that Wisenak, Inc., filed an application for a Native group selection on Dec. 17, 1973, under the Alaska Native Claims Settlement Act. On Dec. 28, 1971, PLO No. 5150 withdrew the above-described lands from all forms of appropriation under the public land laws, including leasing under the mineral leasing laws, selection by the State of Alaska under the Alaska Statehood Act, and from selection by any Native group or village or regional corporation under the Alaska Native Claims Settlement Act of Dec. 18, 1971.

In view of the above, the Decision concluded that the lands described in the application for selection filed

on Dec. 17, 1973, were not available for selection on that date. Accordingly, the application was thereby rejected.

On June 25, 1974, Wisenak, Inc., filed a Notice of Appeal to the Decision of the State Director rejecting the Wisenak, Inc., selection and subsequently on Aug. 28, 1974, filed Appellant's Statement of Reasons for appeal.

Appellant contends that the Decision appealed from is in error and that its application for selection of lands should be reinstated and granted. The right of selection of the subject lands was guaranteed to the Native people of Wiseman by the Act, and thus the right of the group corporation to the land in the locality of Wiseman was a valid existing right and not subject to the terms of PLO No. 5150. In the alternative the appellant argues that the Secretary is without the authority to preclude selection by a Native group of lands in the utility corridor established by PLO No. 5150. Neither the Act nor the Secretary's general statutory powers provide the basis for his action. The exclusion of Native group selections under PLO No. 5150 is an ultra vires act and must be regarded as a nullity. As such, PLO No. 5150 cannot stand as the basis for the decision by the Bureau of Land Management.

The State Director, in its response, argues that appellant's Statement of Reasons challenges the validity and legality of PLO No. 5150 and BLM's resulting deci-

sion. The issues thus raised by appellant pertain directly to the scope of authority vested in the Alaska Native Claims Appeal Board by the Secretary. The State Director argues that the authority of the Board is restricted to the review of findings of fact or decisions rendered by Department officials in matters relating to ANCSA selections. The Board is not authorized to countermand Departmental policy or to declare invalid Secretarial Orders.

In the alternative the State Director argues that if the Board decides that it has the requisite authority to take jurisdiction over the subject matter of this appeal, that the appellant is precluded from selecting these lands by prefatory language of sec. 14(h) which limits selections to unreserved and unappropriated public land located outside the areas withdrawn by secs. 11 and 16. Because the lands in question were withdrawn for the trans Alaska pipeline corridor, the lands being thus appropriated cannot be available for selection.

The State Director further argues that contrary to appellant's contentions that sec. 17(c) permits groups to select corridor lands, there is in fact no absolute right for Native groups to receive land. Sec. 14(h) (2) gives the Secretary discretionary authority to select lands for Native groups as opposed to the mandatory language of sec. 11 which specifically withdraws lands for village and regional selection. In this particular situation, the Sec-

retary exercised his discretion and withdrew Ts. 30 and 31 N., Rs. 11 and 12 W., for the pipeline corridor and not for the Native Group of Wisenak. Therefore, appellant has no statutory basis for its appeal.

Appellant, in a supplemental brief, responds to the State Director's contentions by stating that the regulations for Native group selection under sec. 14(h) (2) of ANCSA, as set forth in 43 CFR 2653.0-3, recognized the Secretary's obligation to make withdrawals for Native groups. Second, the date of the passage of the Act, Dec. 18, 1971, is recognized to be the date on which the rights of such groups vest. Third, the mandatory nature of the location of the acreage entitlement is recognized. Any discretion which the Secretary may have once possessed was exercised and BLM cannot now maintain that such discretion is of a continuing nature so as to violate the regulations which have been adopted to the detriment of those claiming under them.

Furthermore, appellant argues that the requirement of ANCSA sec. 14(h) that the land be unreserved and unappropriated is likewise met. For on the date on which the appellant's right to select land became vested, Dec. 18, 1971, the land surrounding the appellant's locality was unreserved and unappropriated.

## DISCUSSION

[1] This Board does not have jurisdiction to adjudicate the Secre-

tary's authority to withdraw and reserve public lands for a utility and transportation corridor within the meaning of sec. 17(c) of ANCSA. The Board is bound by PLO No. 5150, as issued by the Secretary.

PLO No. 5150 states:

\* \* \* Subject to valid existing rights, the following described lands are hereby withdrawn from all forms of appropriation under the public land laws \* \* \* and is also withdrawn from \* \* \* selection by any native group or village or regional corporation under the Alaska Native Claims Settlement Act of Dec. 18, 1971 \* \* \* and reserved as a utility and transportation corridor within the meaning of sec. 17(c) of said Alaska Native Claims Settlement Act \* \* \*

[2] Although PLO No. 5150 withdraws and reserves these lands subject to the general exception of "valid existing rights," the Public Land Order precludes selection of these lands by Native groups. If the Order were read as appellant contends, so that Wisenak, Inc., did have a "valid existing right" in the lands withdrawn, then the specific preclusion of Native group selection of these lands would be meaningless surplusage. PLO No. 5150 must, therefore, be read so as to preclude selection by any Native group of the lands withdrawn.

Although the Board does not have jurisdiction to question the authority of the Secretary to issue PLO No. 5150, the Board does wish to point out that this Public Land

Order is not inconsistent with the terms of secs. 14(h) and 14(h)(2) which allow for Native group selection only of unreserved and unappropriated public lands. Nor is it inconsistent with sec. 17(c) of ANCSA which specifically precludes Native village and regional corporation selection of lands subsequently withdrawn for utility corridors by the Secretary under his existing authority. If the provisions of sec. 17(c) were not included within ANCSA, the village and regional corporation could select lands withdrawn for utility corridors by the Secretary because such lands would be "public lands" available for such selection. Native groups, however, may not select "public lands," as defined by sec. 3(e) and withdrawn by sec. 11 of ANCSA; Native groups, under sec. 14(h), may select only from lands that are "unappropriated and unreserved." Lands withdrawn for a utility corridor are appropriated and reserved. Therefore, sec. 14(h), by its own terms, prevents Native groups from selecting lands withdrawn by the Secretary for utility corridors, and the authority of the Secretary to prevent Native group selection of lands so withdrawn is not in any way derived from sec. 17(c).

NOW THEREFORE, the decision of the Bureau of Land Management #F-19749, dated May 9, 1974, is affirmed.

This represents an unanimous decision of the Board.

JUDITH M. BRADY,  
*Chairman.*

WE CONCUR:

ABIGAIL F. DUNNING,  
*Member of the Board.*

LAWRENCE A. MATSON,  
*Member of the Board.*

### APPEAL OF EKLUTNA, INC.\*

#### 1 ANCAB 165

Decided *September 28, 1976*

Appeal from the Decision of the Alaska State Director, Bureau of Land Management #AA-6661-B, dated Aug. 1, 1974, rejecting in part a land selection application of Eklutna, Inc., under sec. 12 of ANCSA, 43 U.S.C. secs. 1601-1624 (Supp. IV, 1974), as amended, 89 Stat. 1145 (1976).

Decision of the Bureau of Land Management, dated Aug. 1, 1974, reversed Sept. 28, 1976.

1. Alaska: Alaska Native Claims Settlement Act—Alaska Native Claims Settlement Act: Survey: Generally

Procedures adopted to implement the Public Land Survey System as provided in Title 43, Chapters 1 and 18, and regulations promulgated thereunder are made applicable to land withdrawals by sec. 13 of ANCSA.

Establishing of "standard parallel" or "correction" lines in compliance with authorized procedure to implement Public

Land Survey System is not inconsistent with provisions of sec. 11(a)(1) withdrawal.

2. Alaska Native Claims Settlement Act: Survey: Generally—Alaska Native Claims Settlement Act: Survey: Standard Parallel—Alaska Native Claims Settlement Act: Withdrawals: Cornering

Where townships, which by legal description have a common corner, are not in actual physical contact due solely to the location of a "standard parallel" or "correction" line, the requirement of sec. 11(a)(1)(B) or (C) that townships "corner" will be considered complied with.

3. Alaska Native Claims Settlement Act: Withdrawals: Cornering—Alaska Native Claims Settlement Act: Land Selections: Generally

The provisions of sec. 12(a)(2) of ANCSA and regulations in 43 CFR sec. 2651.4 that lands selected—"be contiguous and in reasonably compact tracts"—are not inconsistent with a finding that townships are properly withdrawn under sec. 11(a)(1)(B) or (C) though actual physical cornering is prevented due to a township-offset resulting from location of a "standard parallel."

APPEARANCES: John R. Snodgrass, Esq., law firm of Graham & James and James Vollintine, Esq., on behalf of Cook Inlet, Inc.; John W. Burke III, Esq., Office of the Regional Solicitor; James N. Reeves, Esq., Assistant State Attorney General; Saul R. Friedman, Esq., law firm of Rice, Hoppner, Blair & Hedland, E. G. Burton, Esq., and J. W. Sedwick, Esq., law firm of Burr, Pease & Kurtz, Inc., on behalf of Eklutna, Inc.

\*Not in Chronological Order.

OPINION BY CHAIRMAN  
BRADYALASKA NATIVE CLAIMS  
APPEAL BOARD

The Alaska Native Claims Appeal Board, pursuant to delegation of authority in the Alaska Native Claims Settlement Act, *as amended*, 43 U.S.C. secs. 1601-1624 (Supp. IV, 1974) and implementing regulations in 43 CFR Part 2650 and Part 4, Subpart J, hereby makes the following findings, conclusions, and decision reversing that decision of the State Director, Bureau of Land Management #AA-6661-B (hereinafter referred to as State Director).

Pursuant to regulations in 43 CFR Part 2650, the State Director is the officer of the United States Department of the Interior who is authorized to make final decisions on behalf of the Secretary on land selections under the Alaska Native Claims Settlement Act, subject to appeal of this Board.

On Aug. 1, 1974, the State Director issued a decision rejecting in part as unavailable for selection by Eklutna, Inc., lands therein described as T. 17 N., R. 3 E., Seward Meridian, Alaska. The decision recites that on Apr. 23, 1974, Eklutna, Inc., submitted an application for lands in accordance with Alaska Native Claims Settlement Act of Dec. 18, 1971 (43 U.S.C. § 1601 (1970)). The selection application included various lands in the following townships; *inter alia*, T. 17

N., R. 3 E., of the Seward Meridian, Alaska. Said decision made findings summarized as follows:

## Sec. 12(a) (1) of ANCSA:

\* \* \* selection shall be made from lands withdrawn by subsection 11 (a): \* \* \*

## Sec. 11(a) (1) of ANCSA:

\* \* \* \* \*

(B) The lands in each township that is contiguous to or corners on the township that encloses all or part of such Native village; and

(C) The lands in each township that is contiguous to or corners on a township containing lands withdrawn by paragraph (B) of this subsection.

\* \* \* \* \*

T. 17 N., R. 3 E., Seward Meridian, is not contiguous to, nor does it corner on the townships in which the Village of Eklutna is located. Neither does it corner on, nor is it contiguous to, the preceding townships. Therefore, it is not among the lands withdrawn under the terms of ANCSA for selection by the Village of Eklutna. In view of the above, selection application AA-6661-B is rejected as it pertains to T. 17 N., R. 3 E., Seward Meridian, Alaska.

Appellant, Eklutna, Inc., asserts in its Notice of Appeal, filed Aug. 20, 1974, as well as in its Brief in Response, filed on Apr. 20, 1976, that the matters in dispute and issues raised in this appeal are as follows:

1. That the land which is subject to this appeal, T. 17 N., R. 3 E., Seward

Meridian, Alaska, lies within the withdrawal area of sec. 11(a) because it is contiguous to T. 17 N., R. 2 E., T. 16 N., R. 1 E., Seward Meridian, as those terms are used in sec. 11(a) (1).

2. Whether the NE corner of T. 16 N., R. 1 E., corners within the meaning of sec. 11(a) (1) (B) of ANCSA with the SW corner of T. 17 N., R. 2 E., when in fact, as disclosed by protracted survey they are 347.82 feet apart when such distance is occasioned by reason of a survey "correction line."

Answering Brief, filed Jan. 27, 1976, by the State of Alaska in support of the decision of BLM and in response to appellant's Statement of Reasons, asserts its support of the conclusion reached in the BLM decision that T. 17 N., R. 2 E., is neither contiguous to, nor cornering on, the core township of Eklutna, Inc. (T. 16 N., R. 1 E.), as required by sec. 11(a) (1) (B), and that the clear language of the statute leaves no room for interpretation as proposed by the appellant. The State argues that although BLM's decision results in a reduction of townships withdrawn under sec. 11(a) (1) (C), such does not provide sufficient reason to reverse that decision. Further, that ANCSA recognizes variances in the amount of lands actually available for selection will depend on factors different with each village and provides for deficiency withdrawals under sec. 11(a) (3) to assure full entitlement. The State contends that the loss to appellant of this township withdrawal due to a "township offset" is analogous to a reduction of available lands for any other reason under terms of ANCSA.

A brief, filed Apr. 9, 1976, by the Regional Solicitor's Office on behalf of BLM, variously asserts as follows:

1. That the withdrawal language of sec. 11(a) (1) of ANCSA is clear and unambiguous and requires no interpretation, and analysis could only conclude that the T. 17 N., R. 3 E., is not withdrawn for selection by Eklutna.

2. That T. 17 N., R. 2 E., by being offset from T. 16 N., R. 1 E., in an amount of 5.28 chains is neither contiguous to nor cornering on that township and therefore, does not meet the terms of sec. 11(a) (1) (B) but does, however, meet the withdrawal conditions of (C).

3. That T. 17 N., R. 3 E., is offset a further distance of 10.55 chains from the NE corner of T. 16 N., R. 2 E., which prevents T. 17 N., R. 3 E., from being withdrawn under (C) since it is not contiguous with, nor cornering on, another township which is withdrawn under (B).

4. The fact that the offset is caused by a meridian convergence correction pursuant to compliance with the official system of survey provides for no justification for not applying the clear language of the terms of ANCSA which results in Eklutna, Inc., having for selection at least 25 townships.

There is no issue raised in this appeal regarding the standing of any party before this Board in this matter.

The Board finds that a number of factual matters material to this appeal are neither disputed nor denied by any party and therefore do not constitute issues requiring specific determination:

1. Eklutna Native Village is physically situated in both T. 16 N., R. 1 W., and T. 16 N., R. 1 E., Seward Meridian, Alaska, which thus determines those townships which are made available for selection under withdrawal of sec. 11(a) (1);

2. A "standard parallel," which is also called a "correction line," extends east and west from the Seward Meridian at this interval which is common to the north boundary of T. 16 N., R. 1 E., and also the south boundary of T. 17 N., R. 2 E.;

3. By legal description, the southwest corner of T. 17 N., R. 2 E., would be also the northeast corner of T. 16 N., R. 1 E., and thus a common corner to both;

4. By legal description, and in fact, T. 17 N., R. 3 E., is contiguous with T. 17 N., R. 2 E.;

5. By official protraction diagram, rectangular system of survey for the Bureau of Land Management, S-14-3, approved June 29, 1960, it is determined that the southwest corner of T. 17 N., R. 2 E., is offset 5.28 chains, along said standard parallel, east from the northeast corner of T. 16 N., R. 1 E.

The dispositive issue raised in this appeal is whether a township which, by legal description, is located within a sec. 11(a)(1)(B) or (C) withdrawal, becomes excluded from the withdrawal and thus unavailable for selection under sec. 12(a), when the failure to be a township that is "contiguous to or corners on," is due solely to having as a common boundary a "standard parallel" or "correction line" pursuant to practice of United States Land Survey System required by sec. 13(b) of ANCSA.

[1] The United States land Survey System has been made applicable to all proceedings under ANCSA by provisions of sec. 13 as follows:

(a) The Secretary shall survey the areas selected or designated for conveyance to Village Corporations pursuant to the provisions of this Act. He shall monument only exterior boundaries of the

selected or designated areas at angle points and at intervals of approximately two miles on straight lines. \* \* \* He shall survey within the areas selected or designated land occupied as a primary place of residence, as a primary place of business, and for other purposes, and any other land to be patented under this Act.

(b) All withdrawals, selections, and conveyances pursuant to this Act shall be as shown on current plats of survey or protraction diagrams of the Bureau of Land Management, or protraction diagrams of the Bureau of the State where protraction diagrams of the Bureau of Land Management are not available, and shall conform as nearly as practicable to the United States Land Survey System.

The system of public land survey was extended to the Territory of Alaska by Act of 1899 C. 424, §1, 30 Stat. 1098. Upon admission of Alaska as a State on Jan. 3, 1959, 72 Stat. 339, coverage by general land law became applicable. The following portions of Title 43, Public Lands, Chapter 18, Survey of Public Lands (43 U.S.C. §§ 751-774 (1970)), are appropriate to the issues before this Board in this appeal:

#### Section 751, Rules of Survey:

The public lands shall be divided by north and south lines run according to the true meridian, and by others crossing them at right angles, so as to form townships of six miles square, \* \* \*.

Second. The corners of the townships must be marked with progressive numbers from the beginning; each distance of a mile between such corners must be also distinctly marked with marks different from those of the corners.

\* \* \* \* \*

Fifth. Where the exterior lines of the townships which may be subdivided into sections or half-sections exceed, or do not

extend six miles, the excess or deficiency shall be specially noted, and added to or deducted from the western and northern ranges of sections or half-sections in such township, according as the error may be in running the lines from east to west, or from north to south; the sections and half-sections bounded on the northern and western lines of such townships shall be sold as containing only the quantity expressed in the returns and plats respectively, and all others as containing the complete legal quantity.

\* \* \* \* \*

Being delegated the responsibility of implementing the United States Land Survey System (Title 43, Public Lands, Chapter 1, Bureau of Land Management, 43 U.S.C. §§ 1-18 (1970)), BLM has, under appropriate regulations, described the process of establishing and the necessity for determining township offsets due to meridian convergence.<sup>1</sup> Since the basis for establishing "standard parallel" lines every 24 miles from the established base line is not an issue in this appeal, it will be unnecessary to engage in a detailed discussion. Some observations will be noted, however, as to the results of establishing this 4th standard parallel north along the Seward Meridian, which is the north boundary line of both core townships of Eklutna, Inc., herein described.

The necessity of locating both standard parallels or correction lines and guide meridians under the

public land survey system has as its function the reestablishing of the correct measurement of township boundaries. The actual measurement along the principal meridian of 24 miles to determine the "standard parallel" or correction line, the actual measurement along the "standard parallel" of 24 miles to determine the guide meridian and the actual measurement along the guide meridian, which is projected on the true meridian, is for the purpose of establishing new corners for townships which lie to the north of that "standard parallel." The result is that due to meridian convergence, those townships which have a "standard parallel" for a north boundary must be of a shorter distance than those townships which have the same "standard parallel" for a south boundary. This manner of making necessary corrections to compensate for the convergence of meridians is well known and needs no substantiation here. It is readily seen and undisputed in this appeal that the northerly boundary line of T. 16 N., R. 1 E., being less than six miles in length, results from a regular requirement under the system of rectangular surveys and is not the result of a peculiar instance involving only this particular township in relation to the township immediately to the north, *i.e.*, T. 17 N., R. 1 E. Thus, the result is not only inevitable, but is a regular occurrence that townships which by legal description corner on each other, *i.e.*, have a common corner, are physically prevented from doing so by an increasingly greater distance

<sup>1</sup> Chapter III, The Systems of Rectangular Surveys, *Manual of Instructions for the Survey of the Public Lands of the United States, 1973*, prepared by the Bureau of Land Management, Technical Bulletin 6, describes the process of and necessity for township offsets due to meridian convergence.

the more northerly the lands are situated.

[2] The manner provided in ANCSA for determining the location of those townships which are withdrawn in relation to the township or townships in which the eligible Native village is situated and thereby made available for selection is set forth in sec. 11(a)(1):

\* \* \* \* \*

(B) The lands in each township that is contiguous to or corners on the township that encloses all or part of such Native village; and

(C) The lands in each township that is contiguous to or corners on a township containing lands withdrawn by paragraph (B) of this subsection.

\* \* \* \* \*

The approach of describing lands being withdrawn under sec. 11(a) in addition to each township that encloses all or part of any eligible Native village under ANCSA, was to so describe townships in tiers of concentric circles which surrounded the "core-townships" of each village and to insure protection from disposition to other parties. Such a method not only provided preciseness of identifying lands withdrawn in relation to the "core-township," and thereby eliminated "free floating" withdrawals, but assured that no lands available for withdrawal were omitted.

BLM, through the Regional Solicitor, argues that provisions of ANCSA reflect Congressional intent that selection rights were intended in only 25 townships, 26 in event a village is within two town-

ships, and cites portions of the Conference Report as authority therefor.<sup>2</sup> A review of the Conference Report, as well as committee hearings prior thereto, indicates to the Board that references describing the withdrawal area as the "25-township area" were merely to describe the result of applying the format of sec. 11(a)(1) to an area from which it was anticipated selection would be made and not to describe any limitations. In fact, application of sec. 11(a)(1) in this instance, encompasses 28 townships in addition to the two core-townships of appellant.

It is contended by the State of Alaska that an analogy can be made in recognizing that the reduction of townships from sec. 11(a)(1) withdrawal due to the failure of T. 17 N., R. 2 E., to "corner" with the "core-township" of appellant constitutes a variance which is similar to others under provisions of ANCSA which restrict selected acreage and thus require deficiency selection to be made under sec. 11(a)(3)(A) to obtain entitlement. The provisions of ANCSA which takes into consideration the circumstances of selection by each Native Village Corporation and enable all deficiency selections to be made, if required, are in no wise appropriate to the issue of whether lands are to be included in an sec. 11(a)(1) withdrawal. Those selec-

<sup>2</sup> In the Conference Report, H.R. 92-746 (1971) at p. 35, 38 and 43, in several instances, Congress explicitly referred to the "25 township area" as the basic withdrawal package for each village.

tion limitations placed by ANCSA on a Native Village Corporation as to lands located in its sec. 11(a) (1) withdrawal are not similar in nature and do not have the same considerations as do those "variances" which deny completion of entitlement within all of the lands withdrawn and made available for selection.

The Conference Report discloses that in only a single instance was any consideration given to the effect of implementation of the United States Land Survey System on land selections, which is in pertinent part as follows:

\* \* \* \* \*

It is recognized that if a principal or special meridian or base line should interest an area withdrawn for selection, a slightly modified selection pattern might result; however, those cases seemed so limited as to not do substantial violence to the intended "checkerboard" selection system contemplated. (Id. at p. 38)

\* \* \* \* \*

Thus, under a circumstance which permits selection only of cornering townships, it is noteworthy that any "township offsets" resulting from requirements of the Land Survey System are determined not to be causing "substantial violence" to the result contemplated.<sup>3</sup> While

<sup>3</sup> Id. at p. 38: " \* \* \* 4. Under the provisions of (ANVSA) subsection 12(c) (3) ' \* \* \* the Regional Corporation may select only even numbered townships in even numbered ranges, and only odd numbered townships in odd numbered ranges.' This language is meant to insure 'checkerboard' selections by the Regional Corporations. The State of Alaska would then be permitted to concurrently select lands in the alternate townships not subject to selection by the Regional Corporations."

such a conclusion is not controlling as to the issue of this appeal, it does indicate that compliance with Land Survey System is recognized as being a factor requiring accommodation to be made within the appropriate provisions of ANCSA and not to be construed in a manner contrary to anotherwise attainable result.

[3] It is noted by the Board that the decisions which have been cited as authorities describing the precise meaning of "contiguous" and "cornering" are not inconsistent with this holding. Inasmuch as there are no issues in this appeal in which actual physical cornering or contiguousness is a requirement for the vesting of title, such determinations are not sufficiently analogous to the issues raised in this appeal as to be determinative of the issue of withdrawal under sec. 11(a) (1). It is further the determination of the Board that the holding of this decision is not inconsistent with the requirements of sec. 12(a) (2) in providing that selections " \* \* \* shall be contiguous and in reasonably compact tracts, \* \* \*" and will in no wise be affected by compliance with this section of ANCSA.

For the above reasons, it is the determination of this Board that under a circumstance where two townships, which by legal description, would corner in a manner consistent with sec. 11(a) (1) (B) and (C) and which do not physically corner for the sole reason of the location of a "standard parallel"

line, the respective townships will be deemed to corner for the purpose of being withdrawn and available for selection under sec. 12(a) of ANCSA. It, therefore, follows that T. 17 N., R. 2 E., does corner with T. 16 N., R. 1 E., and is therefore withdrawn as described in sec. 11 (a) (1) (B). Inasmuch as T. 17 N., R. 3 E., is adjacent to and contiguous with that township, it is also withdrawn in compliance with (C) of this sec. of ANCSA.

This represents an unanimous decision of the Board.

JUDITH M. BRADY,  
*Chairman.*

WE CONCUR:

ABIGAIL F. DUNNING,  
*Member of the Board.*

LAWRENCE A. MATSON,  
*Member of the Board.*

HARRY REICH\*

27 IBLA 123

Decided September 30, 1976

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, rejecting simultaneously filed noncompetitive oil and gas lease offer (NM 26880).

Affirmed as modified.

1. Notice: Generally—Oil and Gas Leases: Applications: Drawings—Privacy Act

Where it does not appear that the notice required by sec. 7(b) of the Privacy Act of 1974 regarding the disclosure of a social security number was given, an oil and gas lease offer on a drawing card filed in a simultaneous drawing procedure should not be considered defective solely because the applicant omitted designating the social security number on the card as provided thereon.

2. Oil and Gas Leases: Applications: Generally—Oil and Gas Leases: Applications: Drawings—Oil and Gas Leases: Applications: Sole Party in Interest

An oil and gas lease offer on a drawing card filed in a simultaneous drawing procedure is properly rejected as defective where there are other parties in interest in addition to the applicant but the card does not list them or refer to an attachment, and an attachment dated nearly 6 months prior to the filing, signed by the applicant and four others stating their qualifications and setting forth a percentage of interest for each as "Partners in interest," fails adequately to set forth the nature of their agreement, and no other statement or information is filed within the time required by 43 CFR 3102.7.

APPEARANCES: Emmanuel B. Quint, Esq., of Quint, Marx & Chill, P.C., Brooklyn, New York, for appellants.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

INTERIOR BOARD OF  
LAND APPEALS

This appeal is brought from a decision of the New Mexico State Office, Bureau of Land Management (BLM), rejecting appellants' simultaneously filed noncompetitive oil and gas lease offer (NM

\*Not in Chronological Order.

26880). The offer received first priority in the drawing for parcel number 194 on the Sept. 15, 1975, Notice of Lands Available for Oil and Gas Filings.

The rejection of the offer was based generally upon noncompliance with regulation 43 CFR 3112.2-1(a) requiring that the drawing entry card be fully executed by the applicant, and upon noncompliance with regulation 43 CFR 3102.7 requiring certain information when there are parties in interest to the lease offer in addition to the applicant. The appellants contend the requirements of these regulations were satisfied by considering the drawing card together with a statement which accompanied the card.

The card, BLM Form 3112-1 (May 1974), includes the signatures of Harry Reich and Sandor Gregledi, dated Sept. 18, 1975, on the back side of the form. The space for listing "Other parties in interest" is left blank. The face side of the card lists the name of Harry Reich, an address, parcel number and state, but the space for designating the Social Security or Taxpayer Number is left blank. A photocopy of a statement dated Mar. 11, 1975, which accompanied the card, states as follows:

#### PARTNERS IN INTEREST

I HEREBY CERTIFY (1) THAT I AM A CITIZEN OF THE U.S.A. AND OVER 21 YEARS OF AGE, (2) THAT MY INTERESTS IN OIL AND GAS LEASES AND OPTIONS DO NOT EXCEED THE LIMITATIONS PROVIDED BY THE MINERAL LEASING

ACT OF FEB. 25, 1920, AS AMENDED, AND (3) THAT I HOLD INTEREST IN THIS APPLICATION AS INDICATED HEREIN:

Below were spaces for six signatures, addresses, social security numbers and percent of interest. Five signatures appear, including Reich and Gregledi, with addresses, social security numbers and a designation for each of 20 percent of interest.

[1] The first question to be decided concerns the lack of social security numbers on the drawing card form itself. One of the reasons for rejecting the offer was the failure to include such numbers on the drawing card. For the purpose of the discussion on this question, we shall consider the card by itself as if no attachment with the social security numbers had been filed. Were there no interdicting authority, we would conclude that the omission of information called for by the card would make the card defective as not being fully executed as required by regulation 43 CFR 3112.2-1(a). See, e.g., *Ray Granat*, 25 IBLA 115 (1976); *John R. Mimick*, 25 IBLA 107 (1976). However, the Privacy Act of Dec. 31, 1974 (88 Stat. 1905), 5 U.S.C. § 552a (Supp. V, 1975), controls the extent to which this Department and other agencies may require certain information from individuals. Sec. 7 of that Act, 5 U.S.C. note following § 552a (Supp. V, 1975), specifically deals with requirements for private individuals to furnish social security numbers to a government agency. It provides:

Sec. 7. (a) (1) It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number.

(2) the provisions of paragraph (1) of this subsection shall not apply with respect to —

(A) any disclosure which is required by Federal statute, or

(B) the disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before Jan. 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.

(b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

We are not aware of any statute or regulation specifically requiring disclosure of the social security number by an oil and gas lease applicant. However, we need not decide whether provision for the number on the drawing card which 43 CFR 3112.2-1(a) *requires* to be fully executed is covered by the exception under (a) (2) (B) quoted above. Even if disclosure may be required within the meaning of that subsection, there should be compliance with subsection (b) pertaining to notice to the individual concerning the request for disclosure, the authority for making the request and the use to be made of the number. With regard to this notice re-

quirement, the Department of the Interior Manual at 317.11.3 (Mar. 22, 1976), states:

*Notices to Individuals.* The Act requires that an individual who is asked to disclose his social security account number be informed whether disclosure is mandatory or voluntary, by what authority the number is solicited, and what uses will be made of it. Whenever an individual is asked to provide his social security number, he must be advised of this information, through an explanation on a questionnaire, on an attached notice, or in an interview handout.

Although the above Manual provision was issued after the drawing involved here, the drawing and filing period were after the enactment of the Privacy Act. The Manual reflects an interpretation and understanding of the Privacy Act. Use of the mandatory language "must" indicates that the notice is to be furnished to the individual if the request is to be made. Since there is nothing in the record which indicates that such a notice was given to applicants in the drawing, we do not believe it is appropriate for an offer on a drawing card to be rejected solely because the social security number has been omitted. Accordingly, to the extent the decisions below held that a drawing card is defective because of failure to include the social security number it is in error and is so modified.

[2] Nevertheless, we find that the offer in this case was properly rejected for other reasons. The back side of the card has a space for listing "Other parties in interest." That space on appellants' card is blank.

There is no reference to an attachment listing such parties.<sup>1</sup> Further, the card refers to 43 CFR 3102.7. This regulation states in part regarding the showing as to parties in interest:

A signed statement by the offeror that he is the sole party in interest in the offer and the lease, if issued; if not he shall set forth the names of the other interested parties. If there are other parties interested in the offer a separate statement must be signed by them and by the offeror, setting forth the nature and extent of the interest of each in the offer, the nature of the agreement between them if oral, and a copy of such agreement if written. All interested parties must furnish evidence of their qualifications to hold such lease interest. Such separate statement and written agreement, if any, must be filed not later than 15 days after the filing of the lease offer. Failure to file the statement and written agreement within the time allowed will result in the cancellation of any lease that may have been issued pursuant to the offer. \*\*\*

The first sentence of this regulation requires the listing of the other interested parties at the time the application is filed. The separate statement to be submitted by the other parties in interest of their qualifications and the information concerning the agreement of all the parties in interest, however, may be filed within 15 days after the filing of the lease offer. This requirement applies also to offers filed in the simultaneous drawing procedures. *E.g.*, *Mary West*, 17 IBLA 84 (1974); *James V. Orbe*, 16 IBLA 363 (1974). The drawing card refers to

this regulation, as indicated above. Further, the sole party in interest statement on the back side of the card which the applicant signs, together with his statement of qualifications, indicates that if he is not the sole party in interest, "the names and addresses of all other interested parties are set forth below."

The applicant should have listed the other parties in interest in the offer in the space provided. If he felt there was insufficient room to list them all, he could have referred to an accompanying attachment.<sup>2</sup> There is no reason apparent for the omission other than perhaps sheer neglect and the applicant's belief that attachment of the statement would be sufficient, even though the card specified that the names should be set forth below. At the drawing the cards alone, without attachments, are placed together in a drum and then cards are drawn. Obviously it would be easy to overlook an attachment if there is no reference on the card to it. We believe BLM personnel should not have to bear the complete responsibility for assuring that attachments may be easily identified with the particular drawing card since they must be separated from the card during the drawing procedure.

<sup>1</sup> A stamp on the face of the card saying "SEE ATTACHMENT" appears to be a BLM stamp used for administrative purposes.

<sup>2</sup> As to adequacy of space, however, we note that in *Gill Oil Company*, 2 IBLA 18 (1971), an applicant had listed in the space provided for other parties in interest the names and addresses of eight other individuals, each identified with a 9.375 percent interest. The statements and information required by 43 CFR 3102.7 were not submitted within the time required, and the offers were held to be defective.

Compare *D. O. Keon*, 17 IBLA 81 (1974), where an argument that an additional party's qualifications were fully attested to in connection with separate offers in the same drawing and need not be furnished was rejected. There the name of the other party together with an address, social security number, and 50 percent interest designation was set forth on the card under "Other parties in interest." It was held the requirements of 43 CFR 3102.7 were not satisfied when no other information was furnished within the time required. Furthermore, in cases involving the failure of a corporate applicant to show the authority of its signing officer on a drawing card where such authorization was not shown in the file referred to as containing the corporation's qualifications, we stated with respect to an argument that there was not space on the card to refer to amendments of qualifications or to specific corporate resolutions:

\* \* \* The regulation says that the offer "must be accompanied by a statement" showing the corporate qualifications, and this would also be true of any amendments to those qualifications. There is sufficient room on the card for appellant to have added after the referenced serial number the words "amendment attached" or "see amendment attached." Appellant then could have filed with the card a certificate evidencing the resolution by its Board of Directors, which it claimed to have filed in the Utah State Office on Mar. 5, 1975.

*Manhattan Resources, Inc.*, 22 IBLA 24, 26 (1975). Thus, we have recognized that attachments to

drawing cards may sometimes be necessary to supply all the information required but that the attachments should be referred to on the card.

We agree with the BLM decision that the attachment failed to meet the requirements of 43 CFR 3102.7 in that there were no other documents or information filed within the time period to supply deficiencies.

As to the statement of qualifications of the parties, the photostatic copy is dated nearly 6 months prior to the filing of the offer. It is apparent that the regulations, by requiring the statement with the offer or within 15 days thereafter, contemplate the showing of the parties' qualifications to be within that time frame. It is very possible in legal contemplation, although concededly not very likely practically, that there could be a change in a party's qualifications in that period of time.

As to the agreement of the parties, the BLM decision indicated a copy of a written agreement among the parties was not supplied within the time required nor was the nature of the agreement set forth, if oral. Appellants explain on appeal that no copy of a written agreement was submitted because there was an oral agreement. However, there is no indication on the statement furnished by the parties that the agreement is oral and it is also unclear from the statement what the nature of the agreement among the parties

is. We believe the mere statement of "PARTNERS IN INTEREST" and the percentages of interest following their names is not adequate. We do not know if the percentages of interest are of record title interest or some other interest in the proposed lease, nor is their characterization as partners in interest such a precise phrase of art which would adequately explain the nature of their interest. Regulation 43 CFR 3100.0-5(b) defining "Sole party in interest," explains the reasons for the requirement concerning disclosure of all parties interested in a lease. It then states:

\* \* \* An "interest" in the lease includes, but is not limited to, record title interests, overriding royalty interests, working interest, operating rights or options, or any agreements covering such "interests." Any claim or any prospective or future claim to an advantage or benefit from a lease, and any participation or any defined or undefined share in any increments, issues, or profits which may be derived from or which may accrue in any manner from the lease based upon or pursuant to any agreement or understanding existing at the time when the offer is filed, is deemed to constitute an "interest" in such lease.

In order to accept appellants' drawing card and attachment as adequately meeting the requirements of the regulations, we would have to make every possible assumption favorable to the appellants to help try to clarify what is not clear from those documents themselves. However, there are adverse parties in a simultaneous drawing. Therefore, we cannot ignore omissions and uncer-

tainties in the offer and attachment. *Cf. McKay v. Wahlenmaier*, 226 F. 2d 35 (D.C. Cir. 1955). Also the explanations offered on appeal cannot cure the defects in the offer. *James D. Caddell*, 25 IBLA 274 (1976). Because we find the offer was properly rejected as deficient for the reasons above given, we need not decide whether it was defective for additional reasons stated by BLM.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified by our discussion concerning the social security numbers.

JOAN B. THOMPSON,  
*Administrative Judge.*

I CONCUR:

MARTIN RITVO,  
*Administrative Judge.*

ADMINISTRATIVE JUDGE  
LEWIS DISSENTING:

I agree with the holding of the majority that the absence of a social security number from the face of the simultaneous oil and gas entry card is not a valid reason for rejecting appellants' lease offer. Sec. 7 of the Privacy Act of 1974, 5 U.S.C. § 552a note (Supp. IV, 1974). However, I am unable to agree with the majority's resolution of the two main issues upon which their affirmation of the decision below is based: (1) the form has not been

fully executed in compliance with 43 CFR 3112.2-1(a) and (2) the statement signed by the interested parties does not meet the requirements of 43 CFR 3102.7.

The regulations require that a lease offer submitted in the simultaneous filing procedures pursuant to 43 CFR Subpart 3112 be filed on an approved form (simultaneous oil and gas entry card) which must be signed and "fully executed" by the applicant. 43 CFR 3112.2-1(a). This Board has consistently held that simultaneous oil and gas entry cards which are incomplete will be rejected. *Roy Granat*, 25 IBLA 115 (1976) (omission of name of State in which land is located); *John R. Mimick*, 25 IBLA 107 (1976) (entry card not dated); *Albert E. Mitchell, III*, 20 IBLA 302 (1975) (omission of name of State in which land is located). However, I disagree with the majority that the entry card has not been fully executed because the space on the card for listing other parties in interest is left blank where the other parties in interest are named on an attachment filed together with the card.

The majority is disturbed by the fact that the entry card does not specifically state "See attachment," in the writing of the appellant. There is no doubt that the attachment herein involved physically came in with the entry card. The only reasonable conclusion from that circumstance is that the appellant intended to file the two docu-

ments together. If appellant had stated on the card "See attachment," that would alert the BLM office and help prevent the attachment from being lost and from not being considered as filed with the card. But no question has been raised here that the attachment was not in fact filed with the card. Therefore, the only logical conclusion is that the attachment was filed with the entry card; it was so treated by the BLM office, and it is part and parcel of the filing.

In my view the issue here is not whether the entry card has been fully executed, unlike the *Granat*, *Mimick*, and *Mitchell* cases, *supra*, because all of the required information was provided in this case, either on the card or the attachment. The issue is whether information which it is not feasible to reproduce on the card itself because of space limitations may be supplied on a supplemental statement attached to the card.

Apart from holding that all information required to be filed with a simultaneous oil and gas lease entry card must be filed on the card itself, this Board has suggested that it is acceptable to file supplemental information on an attachment filed with the entry card where there is a lack of room on the card itself to show the required information. *Manhattan Resources, Inc.*, 22 IBLA 24, 26 (1975).

I do not believe that use of an attachment to the simultaneous oil and gas entry card where required by necessity would place an undue

burden on BLM personnel. Indeed, the alternative would be to place a premium on miniature writing which would exact a heavier burden in terms of legibility. See *William D. Sexton*, 9 IBLA 316 (1973). Therefore, the majority's reference to *Gill Oil Company*, 2 IBLA 18 (1971), wherein the applicant accomplished the feat of displaying on two lines the names of eight interested parties together with the percentage of their interest, seems hardly applicable.

I further disagree with the finding of the majority that the statement of interest signed by the offeror and all of the interested parties fails to comply with 43 CFR 3102.7. A separate statement of interest is a necessary part of any oil and gas lease offer where the offeror indicates he is not the sole party in interest. *Wesley Warnock*, 17 IBLA 338 (1974); 43 CFR 3102.7. Such statement must be signed by the offeror and the interested parties and must set forth:

[T]he nature and extent of the interest of each in the offer, the nature of the agreement between them if oral, and a copy of such agreement if written.

43 CFR 3102.7.

The statement filed in the present case is entitled "Partners In Interest." A "partner" is defined as one who has united with others to form a partnership in business. *Black's Law Dictionary* 1276 (4th Ed. 1951). A "partnership" is defined as a voluntary contract between two or more competent persons to place their money, effects, labor, and

skills, or some or all of them, in lawful commerce or business, with the understanding that there shall be a proportional sharing of the profits and losses between them. *Black's, supra* at 1277. Accordingly, the description of the parties in the statement as partners, when coupled with the designation of the percentage of interest held by each party, is effective to establish the nature of the agreement between the parties, the nature of the interest of the parties, and the extent of that interest. A statement providing this information is sufficient, where a statement of qualifications is also provided. *Wesley Warnock, supra*<sup>1</sup>; *W. D. Girard*, 13 IBLA 112 (1973); see *Thomas Connell*, 7 IBLA 328 (1972). The absence of a copy of a written agreement between the parties other than the statement filed is not prejudicial in the absence of any indication in this case that the partnership has been reduced to a written agreement. The regulation plainly states that a copy of any agreement between the parties is required *only* where such agreement has been reduced to writing. 43 CFR 3102.7.

The question of the earlier dating of the attachment containing the

<sup>1</sup> The statement filed regarding parties in interest in the *Wesley Warnock* case, *supra*, was said to be insufficient because 1) it was not signed by the offeror as well as the other parties in interest and 2) it did not give details of the agreement between the parties (the statement pertained to qualifications only). It should be noted that regardless of other deficiencies in the statement, rejection of the offer in *Warnock* was compelled by the fact that the statement was filed after expiration of the time limit. *Id.* at 342. Thus *Warnock* is distinguishable from the present case.

statement of the parties in interest with respect to the nature and extent of their interest and their qualifications remains. The regulation requires only that the statement "must be *filed* not later than 15 days after the filing of the lease offer." 43 CFR 3102.7 (*italics added*). This was done by appellant. The regulation makes no requirement as to time of execution of the statement. The offer is signed and dated by the offeror, Harry Reich, contemporaneously with the time of filing. The fact that the statement of interest and qualifications signed by the other parties in interest was dated earlier is not, in my opinion, a violation of the regulations. Moreover, it is reasonable to conclude that the attachment was true as of the date of the filing, regardless of its earlier date. Support for accepting the earlier dated attachment can be found in the regulation at 43 CFR 3102.4-1, which permits an offeror to refer to its corporate qualifications set forth in an earlier dated file in the BLM office.

For all the foregoing reasons, I would reverse the decision appealed from.

ANNE POINDEXTER LEWIS,  
*Administrative Judge.*

**TILDEN COAL COMPANY**

**7 IBMA 57**

Decided *October 15, 1976*

Appeal by the Mining Enforcement and Safety Administration from a de-

cision by Administrative Law Judge Richard C. Steffey in Docket Nos. NORT 75-375-P and 75-376-P, assessing \$7,060 in civil penalties and dismissing a Petition for Assessment of Civil Penalty with respect to one alleged violation of the Federal Coal Mine Health and Safety Act of 1969.

*Affirmed.*

Federal Coal Mine Health and Safety Act of 1969: Notices of Violation: Sufficiency

Where a notice of violation does not clearly indicate which of two possible standards is alleged to be violated and an inspector's testimony supports neither the written description nor the section of the regulations cited, such notice is properly vacated.

**APPEARANCES:** Robert J. Phares, Acting Assistant Solicitor, W. Michael Hackett, Trial Attorney, for appellant Mining Enforcement and Safety Administration.

*OPINION BY  
ADMINISTRATIVE  
JUDGE SCHELLENBERG*

*INTERIOR BOARD OF MINE  
OPERATIONS APPEALS*

*Background*

The only notice of violation at issue in this appeal is No. 10 CED, Oct. 8, 1974, citing Tilden Coal Company (Tilden) for an alleged violation of 30 CFR 75.1100-1 in that "only one portable fire extinguisher (4½ pounds) was provided for firefighting equipment on the 1 right working section" in Tilden's

No. 1 Mine located at Clintwood, Virginia. The action taken to abate as described in the Notice of Termination, was as follows: "One (1) portable fire extinguisher (9½ pounds) and a (4½ pound) extinguisher was provided on the 1 right section."

Subsecs. (a) through (f) of sec. 75.1100-1 list the performance specifications which must be met by firefighting equipment, including portable fire extinguishers, required in mines under sec. 311 of the Act (30 U.S.C. § 871 (1970)). Subsec. (e) provides as one alternative that a portable fire extinguisher shall contain a nominal weight of 5 pounds of dry powder and expellant.

Quantity and location of firefighting equipment is prescribed by 30 CFR 75.1100-2. Subsec. (a) of this regulation requires *inter alia* 2 portable fire extinguishers on a working section. Subsec. (e) provides:

*Electrical installations.* (1) Two portable fire extinguishers or one extinguisher having at least twice the minimum capacity specified for a portable fire extinguisher in sec. 75.1100-1(e) shall be provided at each permanent electrical installation.

\* \* \* \* \*

An evidentiary hearing was held in Norton, Virginia, on Nov. 21, 1975. No one appeared on behalf of Tilden and the hearing was conducted according to the default procedures set forth at 43 CFR 4.544. During the hearing, the inspector explained that the area on

which he issued the violation in question was a power distribution center with a rectifier and transformer (Tr. 60), that he had actually intended to cite the operator under 75.1100-2(e) for lack of a second portable fire extinguisher and that the operator had abated the violation by mounting a second portable fire extinguisher at the electrical installation (Tr. 63-64). Counsel for the Mining Enforcement and Safety Administration (MESA) thereupon moved to amend the notice, but the Administrative Law Judge (Judge) did not rule on the motion.

In his decision dated June 3, 1976, the Judge observed that according to the inspector's testimony the operator was being charged with a violation of 75.1100-2(e), which requires two fire extinguishers at an electrical installation. However, the notice did not cite this section and the language used therein described a violation of either 75.1100-2(a) which requires two fire extinguishers on a working section or 75.1100-1(e) specifying the nominal weight of dry powder in a portable fire extinguisher. The Judge, therefore, concluded that neither the written description of the notice nor the section cited actually apprised the operator that he was being charged with failing to have proper firefighting equipment at an electrical installation. Consequently, he dismissed MESA's Petition for Assessment of Civil Penalty to the extent that

it sought a penalty based on this notice.

### *Contentions of MESA*

MESA concedes that the violation was incorrectly cited but contends that it should have been permitted to amend its petition to allege the proper citation. MESA further contends that in a summary proceeding under 43 CFR 4.544 an operator has waived its right to raise objections concerning adequacy of notice, and that in any event, the evidence adduced at the hearing demonstrates that the operator had adequate notice of the regulation it was charged with violating. MESA therefore requests that Notice No. 10 CED, Oct. 8, 1974, be reinstated and that a civil penalty be assessed for the violation cited therein.

Tilden did not participate in this appeal.

### *Discussion*

We believe that under the circumstances of this case the Judge was under no obligation to grant MESA's motion to amend, since the evidence adduced at the hearing did not support the notice and its termination. Furthermore, we cannot conclude that the Judge is required to overlook inconsistent testimony even in a default proceeding as urged by MESA. The inspector's testimony related exclusively to sec. 75.1100-2(e) which requires either one 10-pound or two 5-pound portable fire extinguishers at an electrical installation. The language of

both the notice and termination of the notice is couched in terms tending to indicate either a violation of 75.1100-1(e) (fire extinguisher of insufficient weight) or 75.1100-2(a) (lack of a second fire extinguisher on a working section). Neither of these regulations was referred to by the inspector. Since his oral evidence is completely inconsistent with the alleged charge and supports neither the written description, nor the section cited in the notice, it is possible that his recollection was faulty and that he was speaking of a violation wholly unrelated to that cited in this particular notice. MESA requests not an amendment but in effect the issuance of a new notice. We conclude that both the ambiguity of the notice and the lack of supportive testimony warrant its vacation.

### ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision appealed from IS AFFIRMED and Notice No. 10 CED, Oct. 8, 1974 IS VACATED.

HOWARD J. SCHELLENBERG, Jr.  
*Administrative Judge.*

WE CONCUR:

DAVID DOANE,  
*Chief Administrative Judge.*

LOUIS E. STRIEGEL,  
*Member of the Board.*

**SUN STUDS, INC.****27 IBLA 278**Decided *October 26, 1976*

Appeal from decision of the Coos Bay District Office, Bureau of Land Management, denying a logging road right-of-way application.

**Affirmed.**

**1. Administrative Authority: Generally—Rights-of-Way: Act of January 21, 1895—Rights-of-Way: Applications**

A decision by the Bureau of Land Management rejecting a logging road right-of-way application as not in the public interest will be affirmed in the absence of sufficient reasons to the contrary.

**2. Conveyances: Interest Conveyed—Patents of Public Lands: Generally—Rights-of-Way: Generally**

In the absence of legislation by Congress, a patent from the United States does not convey an implied easement by way of necessity across public land.

**3. Rights-of-Way: Generally**

In order to establish an easement by way of necessity, the requisite necessity must exist at the time of the conveyance. Moreover, if the necessity ceases to exist, the easement also ceases to exist. When other means of access are available, even though less convenient, a way of necessity will not be recognized or the implication becomes subject to control of other circumstances.

**4. Administrative Procedure: Hearings—Rules of Practice: Appeals: Hearings**

It is within the discretion of the Board of Land Appeals to grant a request for

a hearing on a question of fact. In order to warrant such a hearing, an appellant must at least allege facts which, if proved, would entitle him to the relief sought.

**APPEARANCES:** Jerome S. Bischoff, Esq., Martin, Bischoff, Templeton & Biggs, Portland, Oregon, for appellant; Donald P. Lawton, Esq., Office of the Regional Solicitor, Portland, Oregon, for Bureau of Land Management.

**OPINION BY ADMINISTRATIVE JUDGE THOMPSON**

**INTERIOR BOARD OF  
LAND APPEALS**

On Apr. 24, 1973, Sun Studs, Inc., applied for a right-of-way to construct a road across lot 4, sec. 14, T. 22 S., R. 10 W., W.M., pursuant to the Act of Jan. 21, 1895, *as amended*, 43 U.S.C. § 956 (1970). By decision dated July 31, 1975, the Coos Bay District Office, Bureau of Land Management (BLM), denied the application. Sun Studs appeals from that denial.

Appellant owns land in sec. 15 of the above township, which is bounded to the east by the BLM land. Both appellant's and the BLM land are bounded to the south by the Umpqua River. Appellant stated in its application that it desired to develop part of its land as a recreational area for its employees and to conduct logging operations on the remainder. It asserted that it needed the right-of-way be-

cause there is no road access to its property.<sup>1</sup>

Following receipt of the application, BLM prepared an Environmental Analysis Record (EAR). The EAR begins with a description of the proposed road, alternatives to the road and the existing environment at the site.<sup>2</sup> These descriptions are followed by analyses of the effect upon the environment of the proposed road and of each alternative. The EAR concludes with the recommendation that an Environmental Impact Statement be prepared before allowance of a right-of-way.

In its decision, the District Office stated that after a careful review of the EAR and the Congressional policies set forth in the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq.* (1970), appellant's application for a right-of-way was denied "for environmental reasons." It then set forth some of the environmental objections and relevant provisions of NEPA. The decision was grounded on the discretionary authority granted to the Secretary of the In-

terior by 43 U.S.C. § 956 (1970) and set forth at 43 CFR 2812.6-1.

Appellant argues that the decision of the District Office is erroneous for two reasons. First, appellant disputes the conclusion that the proposed road will have an adverse environmental impact. In this regard, appellant alleges that the record does not support the findings of the District Office and that the District Office has misapplied the provisions of NEPA. Second, appellant argues that as successor in interest to the original patentees of the land, it is entitled to a common law easement by way of necessity for access to its land. Finally, appellant requests that a hearing be held.

In answer to appellant's arguments, BLM asserts that the decision of the District Office was "based upon a substantial record \* \* \* and is neither arbitrary or capricious." BLM argues further that ways of necessity are not applicable to land owned by the United States and that, in any event, appellant has not satisfied the necessity requirement of such an easement. We agree for the following reasons that appellant is not entitled to a right-of-way and therefore affirm the decision of the District Office.

[1] Under the Act of Jan. 21, 1895, *as amended*, 43 U.S.C. § 956 (1970), the Secretary of the Interior is "authorized and empowered, under general regulations to

<sup>1</sup> The only road near appellant's property is Oregon State Highway #38, which is on the opposite bank of the Umpqua River. The proposed road would extend from appellant's property across the BLM land along the bank of the river, then across land owned by a third party until reaching an existing county road, a distance slightly over 1 mile.

<sup>2</sup> The original EAR was dated Aug. 1973. Due to a change in Council on Environmental Quality guidelines, the EAR was revised in Oct. 1974. This revision deleted some material but left intact the discussion of the impact of the road on the BLM land.

be fixed by him, to permit the use of the right of way through the public lands" for various purposes including the cutting of timber. The Secretary has issued regulations authorizing BLM to issue a right-of-way permit only "if it is determined that the approval of the application will be in the public interest." 43 CFR 2812.6-1. This Board will affirm a decision of BLM rejecting a right-of-way application made in due regard for the public interest in the absence of sufficient reasons to the contrary. *Jack M. Vaughan*, 25 IBLA 303 (1976); *Hazel E. Kincaid*, 25 IBLA 257 (1976).

Appellant's argument that the record does not support the findings of the District Office is, in effect, an argument against BLM policy as expressed by the District Office. There is some room for disagreement as to the precise effect of the proposed road upon the environment. At least some elements of the EAR and of appellant's environmental report support both positions. However, in the administration of public lands, BLM must make its decisions after considering all pertinent statutes and regulations and after weighing all the facts involved.

The BLM District Office determined, on the basis of a detailed record, that the overall impact of the proposed road would be adverse to the public interest. Appellant argues that the District Office failed to balance competing considera-

tions properly as required by NEPA. This argument fails to overcome the fact that the balance could weigh against appellant, as in fact the District Office so determined. Appellant has not shown either that BLM failed to consider the record properly or that it would be in the public interest to approve the application. Therefore, the decision rejecting appellant's application under 43 U.S.C. § 956 (1970) is affirmed. See *Jack M. Vaughan*, *supra*; *Hazel E. Kincaid*, *supra*.<sup>3</sup>

[2] Appellant also argues that it is entitled to the right-of-way as a common law easement by way of necessity. This easement is explained in 3 TIFFANY, REAL PROPERTY § 793 at 284-86 (3d ed. 1939:

\* \* \* Such an easement ordinarily arises when one conveys to another land entirely surrounded by his, the grantor's, land, or which is accessible only across either the grantor's land or the land of a stranger. In such a case, unless the conveyance is regarded as giving, as appurtenant to the land conveyed, a right of way over the land retained by the grantor, the grantee can make but a limited use, if any, of the land conveyed to him, and the courts, in pursuance of considerations of public policy favorable to the full utilization of the land, and in accordance with the presumable intention of the parties that the land shall not be without any means of access thereto, have established this rule of construction

<sup>3</sup> In view of the holdings in this decision, we need not reach the question whether appellant's desire of access for recreational use of its land could fall within the uses specified by 43 U.S.C. § 956, especially as it has also alleged a use for timber management. Cf. *Zelph S. Calder*, 16 IBLA 27, 81 I.D. 339 (1974).

that, in the absence of indications of a contrary intention, the conveyance of the land shall in such case be regarded as vesting in the grantee a right of way across the grantor's land. [Footnotes omitted.]

*Accord*, *Rose v. Denn*, 188 Or. 1, 212 P. 2d 1077 (1949); *Tucker v. Nuding*, 92 Or. 319, 180 P. 903 (1919); see 2 THOMPSON ON REAL PROPERTY § 362 (1961).

The threshold issue of appellant's argument is the applicability of easements by way of necessity across public lands when the United States is the common grantor. Both appellant and BLM have filed briefs citing support for their respective positions and criticizing the support for the opposing view. The question is one which has not received a definitive answer in the courts. After briefly examining the authorities cited by the parties, we will explain our reasoning for holding that such implied easements are not applicable in this situation.

Appellant cites *United States v. Dunn*, 478 F.2d 443 (9th Cir. 1973), as the controlling authority applying ways of necessity to grants of the United States. In that decision, the court vacated a summary judgment for the Government and ordered a hearing on the factual question of whether the defendants were entitled to a way of necessity. The only discussion of the issue of applicability is contained in a footnote where the court stated that although the Government had not raised the point in its brief, the

court "did give it due consideration and concluded that it lacked merit." *Id.* at 444 n. 2.<sup>4</sup>

In further support of its position, appellant also cites *Bydlon v. United States*, 175 F. Supp. 891 (Ct. Cl. 1959); *Superior Oil Co. v. United States*, 353 F.2d 34 (9th Cir. 1965); *Herrin v. Sieben*, 46 Mont. 226, 127 P. 323 (1912); and *Violet v. Martin*, 62 Mont. 335, 205 P. 221 (1922). In *Bydlon*, the court allowed compensation to resort owners after the Government prohibited air travel over a national forest, based on an easement by necessity theory. There was no discussion of the issue involved in the present case. In *Superior*, the court found that no easement by way of necessity existed across an Indian reservation without reaching the issue of applicability to government grants. In the Montana cases, the court recognized the applicability of the easement when the United States was the common grantor, although the United States was not involved in either case.

As a final basis for arguing that this easement applies to government grants, appellant quotes from 3 POWELL, REAL PROPERTY ¶ 410 at 443-44 (Rohan ed. 1974), criticizing those decisions refusing to allow these easements under

<sup>4</sup>In the recent decision of *United States v. Clarke*, 529 F.2d 984 (9th Cir. 1976), the court declined to hold that *Dunn* supports the principle that a patent may carry with it an implied right-of-way across public land; rather, the court merely accepted for purposes of discussion the appellant's premise that *Dunn* did support such a principle.

government grants. Appellant also cites in support of this criticism: Simonton, "Ways by Necessity," 25 Colum. L. Rev. 571, 579-80 (1925); and 2 TIFFANY, REAL PROPERTY § 363 at 1302 (1902).

BLM, in its brief, criticizes the use of the federal decisions as direct precedent for appellant's position. It cites several cases which hold that these easements do not apply to government grants. In *United States v. Rindge*, 208 F. 611 (S.D. Cal. 1913), the court stated that in its judgment, ways of necessity do not apply to government grants because they are not rights granted by act of Congress. The other cases cited by BLM are opinions of state courts, most of which accept without analysis the principle that ways of necessity do not apply when the Government, either state or federal, is the common grantor. *E.g.*, *Pearne v. Coal Creek Mining and Manufacturing Co.*, 90 Tenn. 619, 18 S.W. 402 (1891); *Bully Hill Copper Mining & Smelting Co. v. Bruson*, 4 Cal. App. 180, 87 P. 237 (1906); *Guess v. Azar*, 57 So. 2d 443 (Fla. 1952). BLM also cites JONES, EASEMENTS § 301, as an example of a treatise writer accepting the principle that ways of necessity do not apply in situations such as appellant's.

In addition, BLM also urges that appellant's argument fails to consider Article IV, § 3 of the Constitution which gives Congress exclusive authority to regulate and control the use and disposal of

public land. BLM argues that grants by Congress are to be construed in favor of the grantor and that nothing passes by implication, citing several opinions of the Supreme Court. We agree that a grant of land by the United States does not give the grantee an easement by way of necessity over adjoining land still owned by the United States, and that a right to an easement over federal land may only be obtained in accordance with specific statutory authority.

Article IV, § 3 of the Constitution gives Congress unlimited power to control and dispose of public land. *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404-05 (1917); *Texas Oil and Gas Corp. v. Phillips Petroleum Co.*, 277 F. Supp. 366, 368 (W.D. Okla. 1967), *aff'd*, 406 F. 2d 1303 (10 Cir.), *cert. denied*, 396 U.S. 829 (1969); *United States v. Hatahley*, 220 F. 2d 666, 670-71 (10th Cir. 1955), *rev'd on other grounds*, 351 U.S. 173 (1956). While the states may exercise some jurisdiction over the public lands, "the settled course of legislation, congressional and state, and repeated decisions of this court have gone upon the theory the power of Congress is exclusive and that *only through its exercise in some form can rights in lands belonging to the United States be acquired.*" *Utah Power & Light Co. v. United States*, *supra* at 404. (Italics added.) *Accord*, *United States v. Oregon*, 295 U.S. 1, 27-28 (1935).

It is established law that federal statutes granting property interests are construed in favor of the Government and that nothing passes by implication. *United States v. Union Pacific Railroad Co.*, 353 U.S. 112, 116 (1937); *Burke v. Gulf, Mobile and Ohio Railroad Co.*, 465 F.2d 1206, 1209 (5th Cir. 1972); *Walton v. United States*, 415 F. 2d 121, 123 (10th Cir. 1969). That vested property rights cannot be based upon implication rather than specific grant is arguably subject only to a possible exception where the United States has adopted and assented to state rules of construction as applicable in interpreting to what extent a United States patent of uplands conveys riparian rights, insofar as the state rules do not impair the efficacy of the grant or use and enjoyment of the property by the grantee. *United States v. Oregon*, *supra* at 28; *Oklahoma v. Texas*, 258 U.S. 574, 594-95 (1922); *Hardin v. Jordan*, 140 U.S. 371, 382-84 (1891); *Packer v. Bird*, 137 U.S. 661 (1891). The reasons for such a rule regarding riparian rights after the United States has conveyed upland, however, do not apply to the rule advocated here. When the United States patents uplands, it conveys the riparian rights unless a contrary intent is manifested. Thus, it completely divests itself of the ownership and control over such rights. Here, however, the United States retains ownership and control over the

land through which the right-of-way is sought.

Appellant argues that the United States, with regard to the public lands, is no different than any individual property owner. The above-cited opinions show that this is not the case. What the Supreme Court stated concerning the inapplicability of estoppel or laches to acts of government agencies is equally relevant to other aspects of public land conveyances:

\* \* \* The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property \* \* \*.

*United States v. California*, 332 U.S. 19, 40 (1947).

As we noted above, there have been some criticisms of cases which have held that the doctrine of way of necessity cannot be imposed upon federal lands and advocacy for the opposite position. However, the critics have failed to show how the doctrine can or should be imposed against the Federal Government. For example, they have not explained the problem of distinguishing between state law and federal law. If a state statutory or common law is applied, they fail to show how this can be invoked to impose a grant over federal land. Similarly, they fail to show the existence of some federal common law which would require imposition of such an easement over federal

lands. Nor have the critics indicated any intent of Congress which can be read into its grants of the public lands that the adjoining public lands should be imposed with such an easement in the absence of acquiring a right under a specific statute.

Congress has not ignored the problem of access to public lands. For example, it has provided for access to "actual settlers" within the boundaries of national forests. 43 U.S.C. § 478 (1970); see 42 Op. Atty. Gen. No. 7 (Feb. 1, 1962). The right of access across public land to a mining claim has been recognized and a right of access across an unpatented mining claim has been reserved to the United States. 30 U.S.C. § 612(b) (1970); *Alfred E. Koenig*, 4 IBLA 18, 78 I.D. 305 (1971); *Solicitor's Opinion*, 66 I.D. 361 (1959); *Solicitor's Opinion*, 65 I.D. 200 (1958). The most general grant of access is for the construction of public highways across unreserved public lands. 43 U.S.C. § 932 (1970). Access for timber and certain other purposes may be authorized over certain public lands under 43 U.S.C. § 956 (1970). As discussed previously, rights-of-way under this statute are granted at the discretion of the Secretary of the Interior.

Congress has not enacted any statute which provides a general right of access across the public lands to all grantees, or their successors, of public land. The fact that Congress has enacted statutes for

specific types of rights-of-way weighs against finding an easement by implication. We note that before enactment of the Taylor Grazing Act, 43 U.S.C. § 315 *et seq.* (1970), and withdrawals of land affecting virtually all of the otherwise unreserved public land in the contiguous United States, there was no federal management or control over private grazing use of such lands. The Supreme Court held that there was then an implied license to use such lands where they were open and unenclosed and where no act of the Government prohibited their use. *Buford v. Houtz*, 133 U.S. 320 (1890). Nevertheless, this use was deemed permissive only, creating no title or rights in the land, nor any grazing rights, that could not be terminated by withdrawal of the Government's consent thereto. *Light v. United States*, 220 U.S. 523, 535 (1911); *Osborne v. United States*, 145 F. 2d 892, 894 (9th Cir. 1944). Thus, even if appellant's argument that there could be an implied right of access prior to an assertion of federal management and control is correct, such an implied license would not create a vested right in the absence of compliance with a specific statute authorizing the right-of-way.

The Department of the Interior can alienate interests in public land only within the limits authorized by law. *Union Oil Co. of California v. Morton*, 512 F. 2d 743, 748 (9th Cir. 1975). We can find no law which grants or confirms such an implied easement across public land

as alleged by appellant. Therefore, we do not recognize any vested right for an easement by way of necessity under the patents which appellant's predecessors in interest received from the United States.

[3] Even if we were to assume, *arguendo*, that an easement by way of necessity could be implied against the United States, appellant has failed to demonstrate that it is entitled to one. The necessity required to establish the easement must exist at the time of the conveyance because it is the presumed intent of the parties to the conveyance that raises the implication. *Rose v. Denn*, *supra*; 3 TIFFANY, *supra* § 793 at 292, § 794 at 297. Moreover, if the necessity ceases to exist, the easement also ceases to exist. *Tucker v. Nuding*, *supra*, 180 P. at 905.

There is division of authority as to the degree of necessity required when the claimant's land adjoins navigable water. The trend in recent years has been away from denying the easement strictly for the reason that any access by water negates the necessity. Annot. 9 A.L.R. 3d 600, 602-03 (1966). The Oregon courts have followed the trend by holding that something less than "strict," or absolute, necessity will suffice to create the easement. *State v. Deal*, 191 Or. 661, 233 P. 2d 242, 250 (1951).

Appellant has not suggested any necessity that might have existed at the time the land was patented which, according to BLM, was in 1896 and 1936. At present, appellant does have access to its land, al-

though less convenient access than if the road were constructed. Public boat landings on the Umpqua River exist both upstream and downstream from appellant's land. Since filing the right-of-way application, appellant has clear-cut its land and ferried the timber by helicopter to the state highway immediately across the river, an alternative also discussed in the EAR. When other means of access are available, even though less convenient, a way of necessity will either not be recognized or the implication becomes subject to control of other circumstances, such as the use of the land contemplated by the parties to the conveyance. *Mackie v. United States*, 194 F. Supp. 306 (D. Minn. 1961); *Rose v. Denn*, *supra* at 1086; Annot. 9 A.L.R. 3d 600 (1966); 3 TIFFANY, *supra* § 794 at 293-96. Moreover, construction of a road across the public land would not give appellant access to its land. It would then have to obtain a right-of-way across private land in order to link up with the only public highway on its side of the Umpqua River. Appellant has not shown how an easement by way of necessity, would apply in these circumstances.

[4] Appellant has also requested a hearing. It is within the discretion of the Board to grant a request for a hearing on a question of fact. 43 CFR 4.415. In order to warrant such a hearing, an appellant must at least allege facts which, if proved, would entitle him to the

relief sought. *Rodney Rolfe*, 25 IBLA 331, 340, 83 I.D. 269, 273 (1976). Here, appellant has not done so. It has challenged the conclusion drawn by BLM from the facts, but has not shown that BLM failed to consider any significant facts which would lead to an opposite conclusion. With regard to the easement by way of necessity, we have ruled as a matter of law that appellant is not entitled to one. Furthermore, appellant has not alleged sufficient facts to warrant a hearing on this issue even if our ruling on the threshold legal issue were otherwise. Therefore, appellant's request for a hearing is denied.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

JOAN B. THOMPSON,  
*Administrative Judge.*

WE CONCUR:

ANNE POINDEXTER LEWIS,  
*Administrative Judge.*

MARTIN RITVO,  
*Administrative Judge.*

R. M. COAL COMPANY

7 IBMA 64

Decided *October 27, 1976*

Appeal by Mining Enforcement and Safety Administration from a deci-

sion of Administrative Law Judge Joseph B. Kennedy, dated Aug. 16, 1976, in Docket No. NORT 75-347-P, in which the Judge assessed \$264 for three violations and \$0.00 for one violation of 30 CFR 70.212 pursuant to sec. 109 of the Federal Coal Mine Health and Safety Act of 1969.

Modified.

# Federal Coal Mine Health and Safety Act of 1969: Penalties: Amounts

Inasmuch as sec. 109 of the Act mandates the assessment of a civil penalty where a violation has been found to exist, it is error to assess a zero penalty in such circumstances because a zero penalty is no penalty: 30 U.S.C. § 819(a) (1970).

APPEARANCES: Robert J. Phares, Esq., Acting Assistant Solicitor, and Stephen Kramer, Esq., Trial Attorney, for appellant, Mining Enforcement and Safety Administration. R. M. Coal Company did not participate in this appeal.

## OPINION BY ADMINISTRATIVE JUDGE SCHELLENBERG

### INTERIOR BOARD OF MINE OPERATIONS APPEALS

#### *Factual and Procedural Background*

On Apr. 10, 1975, the Mining Enforcement and Safety Administration (MESA) filed a Petition for Assessment of Civil Penalty alleging that R. M. Coal Company (R. M. Coal) had committed four violations of the Act and sought the assessment of civil penalties therefor. Having failed to respond to an

order to show cause, a default against R. M. Coal was entered on June 22, 1976, and MESA was ordered to furnish proposed findings of fact, and conclusions of law, including all elements for consideration recited in sec. 109(a) of the Act. After submission of the above-requested information, a default decision was issued by the Administrative Law Judge (Judge) on Aug. 16, 1976, in which he found that all of the violations existed as alleged and in the case of the violation of 30 CFR 70.212 he found that it was a nonserious, non-negligent violation warranting a penalty of \$0.00.

MESA filed a timely appeal to the latter finding, and in its supporting brief claims that sec. 109(a) of the Act mandates the assessment of a civil penalty for every violation found to exist, that \$0.00 is not a civil penalty, and that such assessment violates the language and intent of sec. 109(a) of the Act.

#### *Issue Presented*

Whether a Judge errs in assessing a civil penalty of \$0.00 where he finds a violation of a mandatory safety standard and also finds that the violation was nonserious and the operator non-negligent.

#### *Discussion*

The language of sec. 109 of the Act is clear, and the Board is of the opinion that there can be no dispute that when a violation is found to

have existed a penalty assessment *must* be made. In the instant case, both the Judge and MESA agree that a penalty assessment was mandatory inasmuch as the Judge found that a violation of 30 CFR 70.212 had existed. The sole question on appeal is whether \$0.00 constitutes a civil penalty. For the reasons set forth below, the Board is of the opinion that it does not.

In *Old Ben Coal Company*, 4 IBMA 198, 82 I.D. 264, 1974-1975 OSHD par. 19,723 (1975), the Board stated that "a penalty of \$10,000 for each of the two violations charged is justified in order to penalize the operator for the violations and to deter it from future violations, the latter being one of the principal intentions of Congress in mandating that civil penalties be assessed for each violation." However, in a subsequent decision, the Board held that, based on its consideration of the statutory criteria, no more than a nominal penalty of \$1 was warranted for each of several violations. In *the Matter of: Potochar and Potochar Coal Company*, 4 IBMA 252, 1974-1975 OSHD par. 19,732 (1975).

Mandatory civil monetary penalties were intended by Congress to penalize violations and to deter future violations. Once a violation is found to have existed, it is incumbent upon a Judge to assess a monetary penalty which comports with this intention. A penalty of \$0.00 assesses nothing and deters nothing, and, in essence, is a finding of no

violation. If, as apparently this Judge concluded, only a nominal penalty is warranted, the penalty assessment may be as little as \$1 or less, but in no case, may it be \$0.00. Accordingly, it is error for a Judge to assess a \$0.00 penalty where he finds a violation to have existed.

In his decision, the Judge based his authority to assess a \$0.00 penalty upon his interpretation of the legislative history. Inasmuch as the Board has indicated that the language and intention of section 109 is clear and unambiguous, we see no need to resort to the legislative history. However, in order to clear up any misunderstanding and since MESA takes issue with the Judge's interpretation we believe that a few observations are necessary.

The Judge relied on the fact that the portion of the Senate bill specifying a minimum penalty of \$1 was deleted in conference in favor of the House version which omitted any reference to a minimum penalty. House Committee on Education and Labor, *Legislative History—Federal Coal Mine Health and Safety Act*, Committee Print, 91st Cong. 2d Sess. 1033 (1970). The Board is of the opinion that such reliance is unfounded.

The legislative history relied upon by the Judge is part of the Statement of the House Managers explaining the changes made in the House and Senate bills agreed upon by the conferees and recommended for adoption by the Congress. The pertinent part of this statement is as follows:

Both the Senate bill and the House amendment provide for the assessment of civil penalties against the operator for violations. Under the Senate bill such a penalty shall not be less than \$1, or more than \$25,000, for each occurrence. Under the House amendment the penalty shall not be more than \$10,000 for each violation with no minimum established. The conference substitute adopts the provisions of the House amendment in this regard with technical changes.

The Board is of the opinion that, instead of authorizing the Secretary to assess no penalty where a violation has occurred, the conferees merely agreed to delete a legislatively fixed minimum penalty.

Rather than remanding this case for assessment of civil penalty for one violation, the Board will exercise its *de novo* review power and assess an appropriate penalty.

Inasmuch as MESA has not questioned the Judge's apparent conclusion that the penal and deterrent value of an assessment for this nonserious, non-negligent violation of 30 CFR 70.212 would be at best, minimal, the Board is of the opinion that a civil monetary penalty of \$1 is warranted.

### ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision of the Judge in the above-captioned case IS MODIFIED to the extent that a penalty of \$1 is assessed for the violation described in Notice of Violation No. 2 AHA, Apr. 17,

October 28, 1976

1974, and that R. M. Coal Company pay a penalty assessment in the amount of \$265 on or before 30 days from the date of this decision.

HOWARD J. SCHELLENBERG, JR.,  
*Administrative Judge.*

WE CONCUR:

DAVID DOANE,  
*Chief Administrative Judge.*

LOUIS E. STRIEGEL,  
*Member of the Board.*

### TAOS PUEBLO TRACT C

#### Boundaries

Courts have long recognized, in determining boundaries, that calls for natural objects and fixed monuments control those for distances.

#### Indian Lands: Reservation Boundary

Where an Indian tribe acquired title to land under treaty, an erroneous survey of a boundary which became the boundary of an adjacent wilderness area, could be administratively corrected and control would be restored to the tribe under 16 U.S.C. § 473 (1970).

#### Secretary of the Interior

The Secretary has authority to correct an erroneous government survey under 43 U.S.C. § 2 (1970).

M-36834

October 28, 1976

TO: UNDER SECRETARY.

SUBJECT: TAOS PUEBLO  
TRACT C.

In response to your inquiry of July 19, 1976, I have concluded that

an erroneous survey in 1893 misplaced the easterly boundary of a portion of the Antonio Martinez Grant (designated "Tract C"), which was acquired by the United States in trust for Taos Pueblo in 1941. The pertinent facts are:

1. The Antonio Martinez or Lucero de Godoi Grant was confirmed by the U.S. Court of Private Land Claims on Mar. 3, 1891. The decree specified the Grant's boundaries, and the easterly boundary was fixed as "in a northerly direction, the current of said Rio Lucero to its source; thence in a western direction to the current of the Rio del Norte."

2. On Dec. 21, 1893, the Surveyor General Instructed a deputy surveyor, John H. Walker, to survey the Martinez Grant according to the Court of Private Land Claims decree, ordering that the easterly boundary follow "the meander of the Rio Lucero to its source; that the north boundary should be an easterly and westerly line from the source of the Rio Lucero to the Rio del Norte \* \* \*." Subsequently, the surveyor's field notes, plat, and the affidavits of two witnesses confirmed that these instructions had been followed.

3. The United States acquired portions of the Martinez Grant, designated as Tracts A, B, and C, in trust for Taos Pueblo in a condemnation proceeding against the Watson Land Company (Cause No. 129 Civil in the U.S. District Court for

the District of New Mexico) in 1941. The Judgment on Amended Declaration of Taking entered in that action on Aug. 29, 1941, described the easterly boundary of Tract C as "the meander line along the east boundary of said Antonio Martinez Grant as surveyed by John H. Walker (the true East boundary of said Grant being the middle of the stream known as Rio Lucero)," and fixing "The NE corner of said Antonio Martinez Grant [as] at the head of Rio Lucero."

4. The United States Forest Service subsequently acquired land adjacent to the easterly boundary of Tract C. The boundary between the two tracts was never fenced, and no artificial monuments exist on the ground to mark that portion of the line.

5. Taos Pueblo objected to administration by the Forest Service of Bear Lake, which lies below the source of the Rio Lucero. In 1974, its objections combined with an impending survey of adjacent Pueblo lands led to an investigation of the boundary by the BIA. Forestry personnel of the Albuquerque Area Office of the BIA discovered that the distances and bearings of the Walker Survey contained errors in the segment around the northeast corner of 110 chains and that Walker's attempt to correct such errors had resulted in a gross misrepresentation of the boundary line in that vicinity. The BIA report summarized Walker's errors as follows:

The combined error of distance and bearing from the west, and distance from

the east, amounted to 110 chains. Again, for whatever reason, Walker did not choose to correct the bearing between MC 4 and MC 5. Instead he added 80 chains east of, where two lines intersected. The remaining 30 chains were corrected by simply moving a whole section of line (NE corner to 1 mile corner) westerly on a S 83° 15' W bearing probably using MC 3 or the 1 mile location as the key. The latter adjustment was compensated by shortening the distance from supposed MC 80 to the NE corner (removing page 65-66 [of his field notes] and erasure) which both necessitated and permitted a straight line bearing. The survey notes show evidence of several attempts to obtain an acceptable correction.

The overall correction in distance appears 10 chains more than required. However, the survey closed satisfactorily so it could have also compensated for a shortage elsewhere on the north boundary.

The easterly boundary as depicted by the distances and bearings thus altered departs from the Rio Lucero well below its source, erroneously placing Bear Lake and approximately 300 acres outside the line.

6. The proper configuration of the Tract C boundary was shown on a 1945 USGS map of Taos and Vicinity, but the 1963 USGS Wheeler Peak Quadrangle displayed as an "Indefinite boundary" the erroneous Walker survey line.

7. A portion of adjacent Forest Service lands were incorporated in 1964 in the Wheeler Peak Wilderness Area. The erroneous Walker survey line was used to describe the south boundary of the Wilderness Area in a description reported to Congress pursuant to § 3(a)(1) of the Wilderness Act, September 3, 1964 (78 Stat. 890).

The title of the United States and Taos Pueblo to Tract C was established by the judgment in the 1941 condemnation action. The description in that judgment fixed the east boundary of Tract C at the middle of the Rio Lucero and the northeast corner of the Tract at the head of the Rio Lucero. Both the Rio Lucero and its source are natural objects; therefore, the location of the stream and its source prevail over the erroneous courses and distances in the Walker survey. The courts have long recognized that "calls for natural objects and fixed monuments control those for distances." *U.S. v. State Investment Co.*, 264 U.S. 206, 211 (1924); see *U.S. v. Redonds Development Co.*, 254 F. 656, 659 (8th Cir. 1918).

In order to conform to the natural objects which define the boundary of the land acquired under the condemnation judgment, it is necessary to correct the erroneous courses and distances of the Walker Survey. The Secretary has authority to correct an erroneous government survey under 43 U.S.C. § 2, and that authority has been confirmed by the courts and by the Attorney General. *Russel v. Maxwell Land Grant Co.*, 158 U.S. 253, 256 (1895); *Cragin v. Powell*, 128 U.S. 691, 698 (1888); 19 Ops. Atty. Gen. 126 (1888). The fact that the portion of Tract C north of the erroneous Walker line has been administered by the Forest Service as a part of the Wheeler Peak Wilderness Area is not an impediment to

correction of the survey nor to restoration of possession to Taos Pueblo, its beneficial owner. In the Attorney General's Opinion to the President of Jan. 18, 1972, 42 Ops. Atty. Gen.—(1972), the Attorney General recognized that where title to land was acquired by an Indian tribe under a treaty, an erroneous survey of a boundary, which had become the boundary of an adjacent Wilderness Area, could be administratively corrected and that control of the land could be restored to the tribe by executive order under 16 U.S.C. § 473 (1970). The opinion stated:

The fact that a portion of the land is now treated as a wilderness area does not affect the question of restoration. Although validly designated wilderness areas can only be changed with Congressional consent (16 U.S.C. § 1131), the foregoing principles preclude application of that limitation here, where the land should never have been designated a wilderness area in the first place.

The judgment in the Government's condemnation action vested title in the United States and Taos Pueblo to the land west of the Rio Lucero to its source as fully and effectively as the treaty involved in that Opinion. On the basis of the foregoing, it is my opinion that the United States and Taos Pueblo acquired ownership of Tract C under the condemnation judgment which fixed its easterly boundary as the Rio Lucero and the northeast corner as the source of that stream, and that the Secretary has the authority to order immediate correction of the erroneous Walker

Survey to conform to those natural objects. I recommend that the Secretary order such correction without delay and request the President to restore to Taos Pueblo by executive order control of that

portion of Tract C which has erroneously been administered as part of the Wheeler Peak Wilderness Area.

HUGH C. GARNER,  
*Acting Solicitor.*

November 4, 1976

**EVELYN CHAMBERS**Decided *November 4, 1976***27 IBLA 317**

Appeal from decisions of the New Mexico State Office, Bureau of Land Management, requiring additional evidence before issuing oil and gas leases NM-27779, NM-A-27818 Texas, and NM-A-27819 Texas.

Set aside and remanded.

**1. Oil and Gas Leases: Applications:**  
**Generally**

The signature of the offeror on a simultaneous oil and gas lease entry card may be affixed by means of a rubber stamp, if it is the intention of the offeror that it be his or her signature.

**2. Oil and Gas Leases: Applications:**  
**Attorneys-in-Fact or Agents—Oil and Gas Leases: Applications: Drawings—Oil and Gas Leases: First Qualified Applicant**

Where a rubber stamp constitutes an offeror's signature on a simultaneous oil and gas lease entry card, the Bureau of Land Management need not presume that the offeror rather than an agent stamped the card, and where no agent's statement has been submitted, BLM may take appropriate action to establish the circumstances under which the signature was stamped on the card.

**3. Oil and Gas Leases: Applications:**  
**Attorneys-in-Fact or Agents—Oil and Gas Leases: Applications: Drawings—Words and Phrases**

"Agent." The word "agent", as used in 43 CFR 3102.6-1 requiring statements of authority and disclosure of interests in oil and gas lease offers by agents, does

not include an employee who has no discretionary authority and merely acts as the employer's amanuensis in affixing the employer's stamp on a simultaneous oil and gas lease offer entry card, even if it is done outside the actual physical presence of the employer. Any statement required by the Bureau of Land Management to establish the identity of the person who stamped the offeror's name on the card must allow the offeror to provide information to establish whether or not the person was an agent within the meaning of 43 CFR 3102.6-1; merely requiring the offeror to show the stamp was affixed by him or in his presence is not sufficient.

**APPEARANCES:** C. M. Peterson, Esq., Poulson, Odell and Peterson, Denver, Colorado, for appellant.

**OPINION BY ADMINISTRATIVE JUDGE THOMPSON**

**INTERIOR BOARD OF LAND APPEALS**

Evelyn Chambers appeals from separate decisions of the New Mexico State Office, Bureau of Land Management (BLM), requiring her to submit certain affidavits in order to obtain issuance of oil and gas leases NM-27779, NM-A-27818 Texas, and NM-A-27819 Texas. Appellant's simultaneous entry cards for leases NM-27779 and NM-A-27819 Texas had been drawn first, and her simultaneous entry card for lease NM-A-27818 Texas had been drawn second, in the public drawing held by the New Mexico State Office on Mar. 9, 1976. Pursuant to appellant's request, and because the same issue is in-

volved in the three appeals, they have been consolidated for decision.

In all simultaneous oil and gas lease offerings each offeror is required to sign the back of the entry card. Appellant's signature was imprinted on the three entry cards by means of a rubber stamp. Because appellant's entry cards did not carry "original" signatures, the BLM State Office required appellant to execute, and have notarized, the following affidavit:

#### AFFIDAVIT

- ☐ It is my intention that the rubber stamp signature placed on offer to lease ----- be my signature and I personally placed the facsimile signature on the card.
- ☐ The facsimile signature was placed on the entry card, by someone else in my presence, with my permission.

\_\_\_\_\_  
Signature of Offeror

[Notarized.]

Appellant's statement of reasons asserts that after becoming aware of this Board's decisions in *Mary I. Arata*, 4 IBLA 201, 78 I.D. 397 (1971), and *Louis Alford*, 4 IBLA 277 (1972), which allowed signatures on simultaneous entry cards to be affixed by rubber stamp, she determined to use this method in order to save time. She asserts further that on June 17, 1974, she submitted to the New Mexico State Office by certified mail an affidavit verifying her intention to utilize a rubber stamp to sign simultaneous entry cards and indicating that such signatures are valid and have the same effect as her handwritten signature. The statement of reasons

describes her normal business practice in filing the entry cards as follows: after determining, with the advice of a geologist, which parcels to submit offers on, she would direct one of her secretaries to type the proper information on the card and to affix her signature thereon with a rubber stamp.

Appellant discusses five bases for error in the BLM State Office decisions. First, appellant asserts that such an affidavit is not required by any statute, regulation or prior Departmental decision, nor did BLM cite any authority for this requirement. Second, appellant argues that she should not be deprived of a statutory right to a lease for a reason not clearly set out in the regulations prior to the drawing. Appellant's third argument is that her secretary was performing a non-discretionary act in rubber-stamping the entry cards as an amanuensis and that no principal-agent relationship was involved. Fourth, appellant alleges in the alternative that she has adopted the signature as her own by her subsequent acts. As a final argument, appellant points out that this method of signing did not give her an unequal chance or unfair advantage in the drawing.

[1, 2] It is true, as appellant argues, that the signature of the offeror on a simultaneous oil and gas lease entry card may be affixed by means of a rubber stamp if it is the intention of the offeror that such be his or her signature. *Robert C. Leary*, 27 IBLA 296 (1976); *Louis Alford*, *supra*; *Mary I. Arata*, *su-*

*pra.*<sup>1</sup> However, her argument that verification of the offeror's intent concerning such a signature is not required by statute, regulation or decision fails to consider the responsibility of BLM to issue oil and gas leases only to the first *qualified* offeror. 30 U.S.C. § 226 (1970); 43 CFR Subpart 3102. If an oil and gas lease offer is signed by an attorney-in-fact or agent in behalf of the offeror, the qualification requirements direct that certain information concerning the attorney-in-fact or agent must be filed with BLM. 43 CFR 3102.6-1. If this information is not filed, the offer must be rejected. *E.g.*, *Southern Union Production*, 2 IBLA 379 (1975). The same requirement pertains where a facsimile signature is affixed on the offer by an attorney-in-fact or agent. *Robert C. Leary, supra* at 299.

The fact that an entry card is drawn in a simultaneous drawing does not preclude BLM from inquiring into the qualifications of the offeror. *Robertson v. Udall*, 349 F.2d 195 (D.C. Cir. 1965). Unlike a handwritten signature, a rubber-stamped one does not carry the presumption that it was personally executed by the offeror. *Robert C. Leary, supra* at 301. Therefore,

<sup>1</sup> In signing the card, the applicant certifies as to his qualifications to hold oil and gas leases under the law, that he has not filed any other entry card for the parcel involved, that he is the sole party in interest, or if not, that the names of other parties in interest are listed below, and he agrees he will be bound to a lease on the appropriate form. The card warns that it is a crime under 18 U.S.C. § 1001 (1970) to make knowing and willful false, fictitious or fraudulent statements.

BLM may take appropriate action to establish the circumstances under which the signature was stamped on the entry card in order to determine whether 43 CFR 3102.6-1 should have been complied with if the offeror did not imprint the stamp himself.

[3] The method chosen by the New Mexico State Office to ascertain the identity of the person who actually rubber-stamped the offeror's signature on the entry cards was the affidavit described above. Appellant has explained that she could not execute this affidavit because she may not always have been physically present when her signature was stamped on the entry cards by her secretary. She argues, however, that her secretary is not an agent within the meaning of 43 CFR 3102.6-1.

There is no definition of the word "agent" in the regulations regarding oil and gas lease offer filings. In a general context, and in the broadest meaning of the word, anyone who does anything at the behest of another may be considered an "agent" or as having an agency relationship. There are many particular meanings in a wide variety of relations. *E.g.*, 2A *Words and Phrases*, "Agent" (1955).

We must look to the purposes and requirements of 43 CFR 3102.6-1 with regard to agents and attorneys-in-fact to determine what type of relationship is envisaged by that regulation. There are two primary requirements in the regulation. First, it requires evidence of the

authority of the agent to sign the offer in behalf of the offeror. Second, it requires separate statements by the agent and offeror stating whether there is any agreement or understanding by which the agent has received, or is to receive, certain described interests in the lease. If the answer to the second requirement is affirmative, a copy of the agreement, or a description if oral, must be filed together with certain information concerning the agent's qualifications to hold interests in federal oil and gas leases. Thus, the purposes of the regulation are to establish that the person acting for another has actual authority to do so and to establish if the agent has or will have any interest in the lease to be issued. The latter purpose is important to assure that such an agent does not file more than one drawing card in a drawing if he has an interest in the lease, and to establish that his acreage holdings do not exceed the statutory maximum lease interest holdings. *Cf. Pan American Petroleum Corp. v. Udall*, 352 F. 2d 32 (10th Cir. 1965).

The requirements and purposes of the regulation suggest an agency relationship akin to many business and commercial transactions where generally the terms "principal" and "agent" denote a fiduciary relationship with the agent possessing certain authority to act for the principal. *See* 2A C.J.S. *Agency* § 4 (1972). An "agent" may be distinguished from an "employee" in such contexts on the basis of the agent having authority to exercise discre-

tion with respect to the transactions whereas a mere employee is allowed no discretion. *See* 53 AM. JUR. 2d, *Master and Servant*, § 3 (1970); 2A C.J.S. *Agency* § 16 (1972). Thus, an employee, or servant, while being an agent in the broadest sense of that term, may generally be understood to have no authority to act with discretion—only to perform manual or mechanical acts. *Id.*

This distinction is clearly demonstrated in cases where an employee affixed his employer's signature to a document. In such circumstances where the employee is only performing a mechanical act at the direction of the employer, the employee is considered merely to be the "instrumentality" or "amanuensis" by which the employer is exercising the discretion in the transaction. The action is deemed that of the employer acting for himself. The employer's presence at the time of the "signing" is either deemed unnecessary, or the employer's presence is found to be constructive because his judgment was involved and exercised. *See United Bonding Insurance Co. v. Banco Suizo-Panameno, S.A.*, 422 F. 2d 1142, 1147 (5th Cir. 1970); *State v. Hickman*, 189 So. 2d 254, 258-59 (Fla. App. 1966); *Ellis v. Mikelis*, 60 Cal. 2d 206, 384, P.2d 7, 11, 32 Cal. Rptr. 415 (1963); *Houston Oil Co. v. Biskamp*, 99 S.W.2d 1007, 1010 (Tex. Civ. App. 1936); 80 C.J.S. *Signatures* § 6 (1972).

Where an employee, such as a secretary, acts in a purely mechanical capacity as an "amanuensis"

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with no authority to exercise discretion concerning the offer or lease, there is no question concerning the employee having authority to act in behalf of the offeror in affixing the signatures or sharing an interest in the lease. (Of course, if an employee were to receive an interest in the lease, rather than receiving a salary only, such an interest would have to be disclosed by the offeror in any event under 43 CFR 3102.7.)

We conclude that the word "agent" in 43 CFR 3102.6-1 does not embrace an employee who is acting merely as an amanuensis in affixing the employer's stamped signature on an oil and gas lease offer, even if the employer, when an individual, is not actually physically present when the stamp is imprinted on the offer form. We hold, therefore, that any affidavit, or statement,<sup>2</sup> required by BLM as additional evidence on a rubber-stamped signature must allow the offeror to provide sufficient information for BLM to determine compliance with the regulations.<sup>3</sup>

To accomplish this, the statement form should provide for a third category whereby the offeror, if he

did not personally use the stamp or was not in the actual physical presence of the person who affixed the stamp, is able to state the facts from which BLM may draw its own conclusions on whether the person affixing the stamp was an agent of the offeror within the meaning of 43 CFR 3102.6-1. Thus, the offeror would be able to state the business procedure followed and the relationship between himself and the person who affixed the signature. The form should emphasize that actual facts are required rather than legal conclusions.

As indicated, the affidavit required in this case provided for only two circumstances: that the offeror placed the facsimile signature on the card, or that it was placed on the card in his presence with his permission. We emphasize that the purpose of requiring additional evidence from a successful simultaneous oil and gas lease offeror is to determine that offeror's compliance with the appropriate regulations. The affidavit here, as written by BLM, does not accomplish this because actual physical presence may not be necessary in circumstances where the employee is acting as the employer's instrument or amanuensis for the purpose of imprinting a signature.

The facts explained by appellant's attorney suggest that appellant's secretary was acting only as an amanuensis in imprinting appellant's signature. Appellant's attorney has stated appellant is willing to execute an affidavit that the

<sup>2</sup> It is not necessary that statements required as additional evidence be in the form of an affidavit. Any person who "knowingly and willfully" makes "false, fictitious or fraudulent statements or representations" in a matter "within the jurisdiction of any department or agency of the United States" is subject to criminal sanctions. 18 U.S.C. § 1001 (1970); 43 CFR 1821.3-1.

<sup>3</sup> To avoid confusion and misunderstanding regarding "constructive" presence, the form should be changed to make clear that the statement regarding "presence" refers to actual physical presence, since this is the meaning which most persons would understand.

stamped signatures constituted her signatures when the cards were filed with the New Mexico State Office. Merely stating that the rubber-stamp constituted her signature is not sufficient, without further explanation. Because appellant did not personally sign the appeal, when these cases are returned to the New Mexico State Office she should be allowed a further period of time in which to sign personally her statement of the facts explaining the procedure in filing and signing the offer and her relationship with the person affixing the stamp.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is remanded for further action consistent with this opinion.

JOAN B. THOMPSON,  
*Administrative Judge.*

WE CONCUR:

ANNE POINDEXTER LEWIS,  
*Administrative Judge.*

DOUGLAS E. HENRIQUES,  
*Administrative Judge.*

WILLIAM J. SPARKS

27 IBLA 330

Decided November 4, 1976

Appeal from decision of New Mexico State Office, Bureau of Land Management, rejecting a drawing entry card lease offer NM 27184.

**Affirmed.**

**1. Oil and Gas Leases: Applications: Generally—Oil and Gas Leases: Applications: Drawings**

The term "signed and fully executed" as used in 43 CFR 3112.2-1(a) does not interdict the use of a rubber stamp or other mechanical device to affix a signature to a drawing entry card, provided that it is the applicant's intention that the facsimile be his signature.

**2. Oil and Gas Leases: Applications: Generally—Oil and Gas Leases: Applications: Attorneys-in-Fact or Agents**

Where a facsimile affixed by means of a rubber stamp or other mechanical device constitutes an applicant's signature on a drawing entry card lease offer, a State Office of the Bureau of Land Management need not presume that the applicant, rather than an agent, stamped the card. It is proper for the BLM office to make inquiry into the filing to establish that the applicant's signature was affixed at his request and that he formulated the offer. If it is disclosed that the signature was affixed pursuant to a power of attorney, and the offer was not accompanied by the statements required by 43 CFR 3102.6-1, the offer must be rejected.

**3. Oil and Gas Leases: Applications: Generally—Oil and Gas Leases: Applications: Attorneys-in-Fact or Agents—Oil and Gas Leases: Applications: Drawings**

Under 30 U.S.C. § 226 (1970), the Department has no authority to issue a non-competitive oil and gas lease to anyone other than the first qualified applicant. If a drawing entry card lease offer is signed by an agent or attorney-in-fact in behalf of the applicant, or if a facsimile signature of the applicant is affixed upon the offer by an agent or attorney-in-fact, the offer cannot be considered to have been submitted by a qualified applicant

unless it is accompanied by the statements required by 43 CFR 3102.6-1.

**APPEARANCES:** Clifford C. Towns, Jr., Esq., Dallas, Texas, for appellant.

*OPINION BY ADMINISTRATIVE JUDGE HENRIQUES*

*INTERIOR BOARD OF  
LAND APPEALS*

The drawing entry card of William J. Sparks was assigned first priority in a drawing for Parcel 331 in the Nov. 1975 simultaneous filing procedure for noncompetitive oil and gas leases in the New Mexico State Office, Bureau of Land Management (BLM). 43 CFR Subpart 3112. Examination of the card showed that the signature of "Wm. J. Sparks" was mechanically imprinted and not an original signature, whereupon BLM called upon Sparks to file an affidavit over his personal signature stating whether or not it is his intention that the mechanically printed signature be his signature, and further, a statement that he personally placed the imprinted signature upon the card or, if the action was done by a third party, that the action was done in his presence. Sparks replied that he intended the mechanically imprinted signature to be his signature and submitted an affidavit that, effective Sept. 30, 1975, he had appointed one E. Carter Bills III, as his attorney-in-fact for the limited purpose of executing drawing entry cards for inclusion in the BLM simultaneous filing procedure for oil and gas leases and such other docu-

ments necessary for filing his name with the Bureau of Land Management in connection with such offers for oil and gas leases. He assured that the authority conveyed included the mechanical reproduction of his signature by Bills on any document to be filed with BLM.

Thereafter BLM, by decision dated Mar. 22, 1976, rejected the drawing entry card filed by Sparks for Parcel 331 for the reason that the mechanically imprinted facsimile signature of "Wm. J. Sparks" had been placed on the card by E. Carter Bills acting as attorney-in-fact and compliance had not been made with the requirements of 43 CFR 3102.6-1. This appeal followed.

Appellant argues that the regulations do not have a requirement that a principal must personally place a drawing entry card in a machine to imprint a facsimile signature thereon or that such imprinting must be done in the presence of the principal. Appellant suggests that this language in 43 CFR 3112.2-1(a), "offers to lease \* \* \* must be submitted on a form \* \* \* 'simultaneous oil and gas entry card' signed and fully executed by the applicant or *his duly authorized agent in his behalf*" (italics by appellant), allows the actions taken preceding the filing of the subject drawing entry card for Parcel 331. Accompanying the statement of reasons for the appeal were two affidavits; one, dated May 14, 1976, from E. Carter Bills III, stated that as attorney-in-fact for William J. Sparks there is no

understanding between himself and Sparks or any other person, oral or written, whereby Bills or any other person has received or is to receive any interest including overriding royalty or operating agreement in any lease filed for or on behalf of Sparks by Bills, including Parcel 331, the subject of this appeal, and further that he, Bills, has acted as attorney-in-fact for Sparks in this fashion and manner since Sept. 30, 1975. The second affidavit, dated May 15, 1976, was from William J. Sparks, in which he stated that the power of attorney to E. Carter Bills is for the specific limited purpose of filing offers to lease lands available for oil and gas filings through the Bureau of Land Management, for the sole and exclusive benefit of Sparks, and grants to Bills specific authority to execute all statements of interest and of lease holdings in behalf of Sparks, and to execute all other statements required by the statutes or regulations, and that he, Sparks agrees to be bound by such representations of Bills and waives any and all defenses which might be available to him to contest any of the actions of Bills under this power of attorney. Further, that the limited power of attorney authorizes Bills to have the signature of Sparks reproduced mechanically on any document necessary to file offers to lease for lands made available by BLM pursuant to 43 CFR Part 3100, including Parcel 331, the subject of this appeal. And finally, Sparks acknowledged that the limited power of attorney from himself to Bills became effective on September

30, 1975, and applies to whatever documents that have been executed on his behalf since that date. In conclusion, appellant argues that the affidavits have effectively cured any defect under 43 CFR 3102.6-1 which might have existed in his offer for Parcel 331.

It is obvious from the foregoing that the function of Bills vis-a-vis federal oil and gas lease offers in the name of William J. Sparks is something greater than being a mere amanuensis or scribe. See *Evelyn Chambers*, 27 IBLA 317, 83 I.D. 533 (1976); *Robert C. Leary*, 27 IBLA 296 (1976).

[1] In *Mary I. Arata*, 4 IBLA 201, 78 I.D. 397 (1971), and *Robert C. Leary*, *supra*, this Board decided appeals from the rejection of drawing entry cards on which the signature had been affixed by means of a rubber stamp facsimile signature of the offeror. The Board held that 43 CFR 3112.2-1 does not proscribe the use of a rubber stamp or other mechanical device to affix a facsimile signature to a drawing entry card provided it is the intention of the offeror that the imprint be his signature. We adhere to that ruling. However, we must point out, as we did in *Leary*, *supra*, that a handwritten signature and a facsimile signature affixed by mechanical means are not fully equivalent in every respect. A hand-written signature is presumed to have been written by the person named therein, but there is no such presumption attaching to a facsimile signature. 80 C.J.S. *Signatures* § 8 (1953).

[2] A rubber-stamped or mechanically affixed signature on a drawing entry card does not constitute the applicant's signature unless it is so intended. Without additional evidence establishing that appellant intended the facsimile to be his signature, it is not improper to find that such intent is not established. *Roberts v. Johnson*, 212 F. 2d 672 (10th Cir. 1954). Accordingly, it is appropriate for a BLM State Office to require an offeror named in a drawing entry card to which a facsimile signature is affixed to supply evidence of intent. But to meet the requirement that offers be "signed and fully executed" it is not necessary to show that the offeror personally stamped the offer with his facsimile or that such action occurred in his presence. *Leary, supra*.

As we have stated it is within the province of a BLM State Office to inquire into the circumstances surrounding the preparation and filing of a drawing entry card which has a signature affixed by means of a rubber stamp or other mechanical device. Indeed, the State Office must inquire if it is not completely satisfied that there has been compliance with all applicable regulations. At a minimum, BLM should inquire to ascertain who affixed the facsimile signature, where the action occurred and why the facsimile signature was used. Further, BLM may inquire to learn who determined what land to file for. This information may be supplied by a

narrative statement rather than an affidavit. 18 U.S.C. § 1001 (1970).

[3] If the Department determines to issue a noncompetitive oil and gas lease to a parcel of land not within the known geologic structure of a producing oil or gas field, it must issue such lease to the first qualified applicant therefor. *McKay v. Wahlenmaier*, 226 F. 2d 35, 37 (D.C. Cir. 1955); *Ishmael Guerra*, 26 IBLA 116 (1976). In the simultaneous filing procedures followed by the Department, priority is established by a drawing from the entry cards submitted for each parcel shown on the official list of lands available to such leasing. See 43 CFR 3112.2-1; *McKay v. Wahlenmaier, supra*; *Ballard E. Spencer Trust, Inc.*, 18 IBLA 25, 27 (1974).<sup>1</sup>

Although the affidavits submitted with this appeal comply with the requirements of the regulations relating to signatures by attorneys-in-fact, the drawing entry card of Sparks must be rejected because the offer was deficient when filed and the rights of a third party have intervened. As this Board stated in *Ballard E. Spencer Trust, Inc., supra* at 27:

Finally, and perhaps more important than any other consideration, is the right of a qualifying third party offeror to receive a noncompetitive lease. The Mineral Leasing Act specifically provides that lands to be leased noncompetitively must be leased to the first qualified person making application, whereas lands within the known geo-

<sup>1</sup> *Aff'd sub nom. B.E.S.T., Inc. v. Morton*, Civ. No. 75-060 (D. N.M., filed Aug. 19, 1975), appeal pending.

logical structure of a producing oil or gas field shall be leased to the highest responsible qualified bidder. 30 U.S.C. § 226(b)(c) (1970). Under the simultaneous filing procedure for lands to be leased noncompetitively, all offers for the same land are considered to have been filed simultaneously, and priorities are determined by a drawing. If the first drawn offer is not acceptable by reason of some failure to comply with the regulation it cannot be accorded a priority as of the time it was officially filed. The next drawn offer in acceptable form earns priority as of the date and time of the simultaneous filing, and that offeror is first qualified *as a matter of law* to receive the lease. See 43 CFR 3112.2-1 (a) (3); 43 CFR 3112.4-1; *McKay v. Wahlenmaier*, 226 F. 2d 35 (D.C. Cir. 1955); *Duncan Miller*, 17 IBLA 267, 268 (1974).

The drawing entry cards contain instructions which, *inter alia*, provide that "compliance *must* also be made with the provisions of 43 CFR 3102." Part 3102 defines the qualifications of lessees, and 3102.6 sets forth the statements and evidence required when an attorney-in-fact or agent signs an offer in behalf of the applicant. If the offeror's signature is impressed by an agent or attorney-in-fact by means of a facsimile signature stamp or otherwise, the applicant cannot be considered "qualified," and the offer to lease drawn with first priority accepted, unless the statements required by 43 CFR 3102.6-1 have been filed with the drawing entry cards. *Southern Union Production Co.*, 22 IBLA 379 (1975); *Husky Oil Co.*, A-30440 (Oct. 27, 1965).

It has been repeatedly held by this Board that, in the simultaneous filing procedure, a first-drawn

card which is defective because of noncompliance with a mandatory regulation must be rejected and may not be "cured" by submission of further information. *James D. Caddell*, 25 IBLA 274 (1976); *Ballard E. Spencer Trust, Inc.*, *supra* at 27-28; *Southern Union Production Co.*, *supra*; *Union Oil Co. of California*, 71 I.D. 287 (1964); *aff'd Union Oil Co. of California v. Udall*, Civ. No. 2595-64 (D.D.C. Dec. 27, 1965).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

DOUGLAS E. HENRIQUES,  
*Administrative Judge.*

WE CONCUR:

NEWTON FRISHBERG,  
*Chief Administrative Judge.*

FREDERICK FISHMAN,  
*Administrative Judge.*

### HAT RANCH, INC.

27 IBLA 340

Decided November 4, 1976

Appeal from decision of Administrative Law Judge Robert W. Mesch requiring the Bureau of Land Management to issue Hat Ranch, Inc., two 10-year grazing renewal permits (NM 3-74-1).

Reversed and remanded.

1. Administrative Authority: Generally—Grazing Permits and Licenses:

## Cancellation or Reduction—Grazing Permits and Licenses: Generally

A grazing permittee under sec. 3 of the Taylor Grazing Act does not have an absolute right to a permit renewal even though denial thereof will impair the value of his grazing unit which is pledged as security for a bona fide loan. The Department may refuse to renew such a permit when the public interest requires that the subject land be preserved from unnecessary injury, exchanged, disposed of, or reclassified for alternate public use. Similarly, if the Department may deny renewal outright under the above circumstances, the Department may renew such a permit for a lesser term than previously allowed pending completion of a Management Framework Plan and an Allotment Management Plan which are oriented not only to livestock grazing, but also to multiple use management which includes such concerns as land and water conservation, environmental protection, and other resource management objectives which can be achieved by reclassification of national resource lands and manipulation of grazing activity.

### 2. Grazing Permits and Licenses: Generally—Words and Phrases

"Such permit" as used in sec. 3 of the Taylor Grazing Act, 43 U.S.C. § 315b (1970), providing for a renewal of a grazing permit does not mean only a permit identical with the terms and provisions of the original.

### 3. Grazing Permits and Licenses: Generally—National Environmental Policy Act of 1969: Environmental Statements

Where by final judgment a court has ordered that until an appropriate environmental impact statement is issued the BLM will issue authorization for livestock grazing only on an annual basis, a grazing permit can be renewed for only

one year, even though the grazing unit has been pledged as security for a bona fide loan.

**APPEARANCES:** Lewis C. Cox, Jr., Esq. and Harold L. Hensley, Jr., Esq., of Hinkle, Bondurant, Cox & Eaton, Roswell, New Mexico for appellee; James A. Coda, Esq., and Gail L. Achterman, Esq., Office of the Solicitor, Department of the Interior, Washington, D.C., for appellant.

## OPINION BY ADMINISTRATIVE JUDGE RITVO

### INTERIOR BOARD OF LAND APPEALS

The Bureau of Land Management (BLM) has appealed from a decision of Administrative Law Judge Robert W. Mesch, dated Feb. 3, 1975, which held that sec. 3 of the Taylor Grazing Act, *as amended*, 43 U.S.C. § 315b (1970), required the BLM to renew appellee's 10-year grazing permits for an identical period of 10 years because the original permits were pledged as security for a bona fide loan, and denial of 10-year renewals would impair the value of the grazing unit. The Judge also found no justifiable reason for denying the permittee's 10-year permit renewal request.

The pertinent portion of sec. 3 of the Taylor Grazing Act reads as follows:

That the Secretary of the Interior is hereby authorized to issue or cause to be issued permits to graze livestock \* \* \*. \* \* \* Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners en-

gaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them \* \* \*. *[No permittee complying with the rules and regulations laid down by the Secretary of the Interior shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan. Such permits shall be for a period of not more than ten years, subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior, who shall specify from time to time numbers of stock and seasons of use. \* \* \* So far as consistent with the purposes and provisions of this Act, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this Act shall not create any right, title, interests, or estate in or to the lands. (Italics added.)]*

Pursuant to the provisions of the Taylor Grazing Act, *supra*, Hat Ranch, Inc., acquired two 10-year grazing permits for a period covering Mar. 1, 1964, to Feb. 28, 1974. The permits had been pledged as security for loans amounting to \$250,000 from the Federal Land Bank Association of Las Cruces, New Mexico, and the Security Bank and Trust Company of Alamo-gordo, New Mexico.

On Dec. 5, 1973, the District Manager, BLM, Las Cruces, New Mexico, received a renewal application from appellee requesting new 10-year permits so that it could again pledge the same as collateral with its financial institutions. The Advisory Board of New Mexico Graz-

ing District No. 3 recommended that Hat Ranch's permits be renewed as applied, namely, for a 10-year period. The District Manager, however, by proposed decision dated Feb. 15, 1975, determined that term permits for a period of 10 years should be denied, and that pending completion of the Management Framework Plan for the Mesa Planning Unit, term permits for a period of 3 years should be issued instead. The District Manager added that upon completion of the Management Framework Plan, a grazing management system would be implemented for appellee's allotment. He then stated the following:

The reasons for my proposed decision are as follows:

1. The law and the regulations allow for discretion in the issuance of term permits (43 CFR 4111.3-2(b), 4115.2-1 (c) and 4115.2-6(b)). Authorizations for livestock use should be on a short term basis until such time as the public resources have been inventoried and the use demands and conflicts known. The general public, in whose trust BLM manages the land, has a right to participate in formulating future plans. Livestock grazing is the most widespread use, and grazing exerts a significant influence on resource conditions of the public lands. Term permits that are not tied to proper resource planning may not provide for other public land management considerations. Upon completion of the management framework plan for the Mesa Planning Unit we will be in a position of providing for all public land management considerations.

2. It is a long term goal and objective of the Bureau's range program to obtain livestock grazing management on all public lands where grazing is involved and where retention of Federal ownership and multiple use management is expected.

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Grazing systems which provide a specific sequence of livestock grazing by designated areas are designed to accomplish these management objectives. (43 CFR 4110.0-5(v)). These multiple use objectives which are identified through multiple use planning will include improvement in resource condition and enhancement of environmental values.

There is an ever increasing public awareness and interest in protecting all resources of the public lands. Therefore it is necessary that we assure that we are on the right course before long term grazing permits are issued.

Thereafter, pursuant to 43 CFR 4115.2-1(b), appellee filed a protest against the BLM's proposed decision. By decision dated Mar. 22, 1974, the District Manager reaffirmed his earlier decision for the reasons stated above. Pursuant to 43 CFR 4115.2-3, Hat Ranch, Inc., appealed from the decision of the District Manager and requested a hearing before an Administrative Law Judge. In its prehearing brief, appellee basically argued that the provision in section 3 of the Act concerning grazing privileges pledged as security for loans required the BLM to renew a 10-year permit for an identical 10-year term if the original permit had been pledged as security for a bona fide loan and if denial of renewal for the 10-year period would impair the value of the permittee's grazing unit.

A hearing on the matter was held in Las Cruces, New Mexico, on Oct. 23, 1974. Thereafter, on Feb. 3, 1975, Judge Mesch issued his decision wherein he held the following: (a) the issuance of a 3-year permit in lieu of a 10-year permit does not

constitute a renewal of "such permit" within the contemplation of sec. 3 of the Taylor Grazing Act (Dec. at 3); (b) a grazing permittee does not have an absolute right to a 10-year renewal of a permit even if a denial thereof will impair the value of the grazing unit and the original permit is pledged as security for bona fide loans (Dec. at 3, citing *Charles H. McChesney*, 65 I.D. 231 (1958)); (c) while the Department has discretion with respect to permit renewal, there was no justifiable reason for the denial of appellee's request for 10-year renewal permits and, therefore, the action of the District Manager was arbitrary and capricious (Dec. at 7); and (d) the refusal to renew the 10-year permits for an additional 10-year period impairs the value of appellee's grazing unit (Dec. at 12).<sup>1</sup> Judge Mesch then ordered that the case be remanded to the District Manager for the issuance of 10-year grazing permits pursuant to appellee's renewal application.<sup>2</sup> The Bureau of Land Management appealed from this decision.

<sup>1</sup> In his decision at 7, n. 2, Judge Mesch stated that:

"It might be argued that it is not necessary to even consider this question [of whether the refusal to renew the 10-year permits for a period of 10 years impairs the value of the appellee's grazing unit which is pledged as security for bona fide loans] inasmuch as a permittee has a preference right of renewal in the discretion of the Secretary and if there is no justifiable reason for a denial of a request for renewal, then the permit should be renewed even if there is no showing that a failure to renew will impair the value of the grazing unit pledged as security for a loan."

<sup>2</sup> Pending the outcome of this appeal, Hat Ranch, Inc., is grazing livestock on national resource lands under annual licenses.

In its statement of reasons on appeal, the Government presents three issues for our consideration. (1) Does section 3 of the Taylor Grazing Act require that 10-year grazing permits be renewed for a full 10-year term when the permits are pledged as security for bona fide loans and denial will impair the values of the grazing unit? (2) Was there a justifiable reason for the District Manager to renew the applicant's permits for 3 years rather than 10? And (3) did the refusal to renew the applicant's permits for 10 years significantly impair the value of the permittee's grazing unit as security for bona fide loans?

[1] To begin with, we note our agreement with Judge Mesch's conclusion that a permittee who has pledged his permit as security for a bona fide loan does not have an absolute right to a renewal even though denial thereof will impair the value of the grazing unit.<sup>3</sup> The pertinent provision of sec. 3 was first discussed by the Department in *Alford Roos*, 57 I.D. 8 (1938), where the Department held that issuance of a grazing license<sup>4</sup> to one

whose livestock unit was pledged as security for a bona fide loan did not bar adjustment of boundaries of grazing districts resulting in eliminating some of the lands under the license even though such action would prevent the renewal of the license with respect to the eliminated area. By way of dictum, the decision implied that the result might have been different if a *permit* had been issued, but the distinction was not developed and the decision closed instead with the following (57 I.D. at 10-11):

Even though it were true that the above-quoted provision of sec. 3 ["pledged as security" clause] did prohibit the action complained of and the renewal of a license to Roos were mandatory, there is nothing to assure him of the renewal of his license on the identical lands heretofore allotted to him.

The case does not require an answer to the question of whether there could be an adjustment of the boundaries of a grazing district so as to eliminate therefrom the lands allotted under a *permit* \* \* \* where the livestock unit dependent on the allotment is pledged as security for a bona fide loan. (Italics in original.)

In *Charles H. McChesney, supra*, the BLM awarded the appellant fewer renewal grazing privileges than the amount for which he applied, based upon a BLM reexamination of the carrying capacity of the Federal range and the commensurability of appellant's base property. The appellant argued that since he had complied with the applicable rules and regulations of

<sup>3</sup> In its appeal brief, the appellee still maintains that sec. 3 of the Taylor Grazing Act requires that grazing permits pledged as security for bona fide loans must be renewed, "as a matter of right" for an identical term as previously allowed if the denial thereof will impair the value of the grazing unit (Brief at 5).

<sup>4</sup> Licenses are issued under sec. 2 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315a (1970). For a discussion of the privileges and distinctions respecting licenses and permits, see *United States v. Fuller*, 409 U.S. 488 (1973); *Brooks v. DeWar*, 313 U.S. 354 (1941); *United States v. Cox*, 190 F. 2d 293 (10th Cir. 1951); *Osborne v. United States*, 145 F. 2d 892 (9th Cir. 1944); *United States*

*v. Maher*, 5 IBLA 209, 79 I.D. 109 (1972); *E. L. Cord, dba El Jiggs Ranch*, 64 I.D. 232 (1957); *Frank Halls*, 62 I.D. 344 (1955); *Solicitor's Opinion*, 59 I.D. 340 (1946).

the Department, and his Federal grazing rights had been used to partially secure \$580,000 of bona fide loans, the BLM could not refuse to fully renew his grazing privileges. While the appellant was actually applying for licenses instead of permits, and no showing had been made that refusal would impair the value of the grazing unit as collateral, the opinion nonetheless went on to state (65 I.D. at 237) :

When the provision in question is read, as it must be, in conjunction with the other provisions of the act, *it is clear that a permittee whose grazing unit is pledged as security has no absolute right to have a permit renewed. A grazing permit is not a guarantee that Federal range for grazing a specified number of live-stock will be available over a period of time.* Range land which is covered by a permit granting exclusive grazing privileges may be exchanged under sec. 8 of the act (43 U.S.C., 1952 ed. sec. 315g) ; it may be classified under sec. 7 of the act \* \* \* for any other use than grazing and disposed of in accordance with such classification under the applicable public land laws ; and the establishment of grazing districts on the public domain is authorized by sec. 1 of the act "pending final disposal" of the public lands (43 U.S.C., 1952 ed. Supp. V. sec. 315). Consistently with these statutory provisions, the range code provides that a license or permit may be reduced proportionately to the reduction in grazing capacity caused by loss of the Federal range due to appropriation (43 CFR, 1954 Rev., 161.6(e) (6) (Supp.)). The administration of sec. 2 of the act (43 U.S.C., 1952 ed., sec. 315a) which requires that the Secretary make provision for the protection and improvement of grazing districts, make rules and regulations to preserve the land from un-

necessary injury, and provide for the orderly use, improvement, and development of the range may also limit the grazing privileges of any applicant (see 43 CFR, 1954, Rev., 161.6(e) (5) (Supra)). (Footnote omitted.) (Italics added.)

The provision in question has also been construed by the courts. In *LaRue v. Udall*, 324 F. 2d 428 (D.C. Cir. 1963), *cert. denied*, 376 U.S. 907 (1964), *aff'g W. Dalton LaRue, Sr.*, 69 I.D. 120 (1962), holders of grazing *permits* on national resource lands challenged the Secretary's approval of an exchange of public grazing land for private land owned by a Government contractor in a transaction that would put the grazing land to industrial use for national defense purposes. At the Departmental level, the Secretary held that sec. 8(b) of the Taylor Grazing Act, *as amended*, 43 U.S.C. § 315g(b) (1970), authorized an exchange under the circumstances of the case. On appeal, the appellant for the first time raised the argument that the Secretary could not terminate the permits and effect the exchange because the permits had been pledged as security for bona fide loans. The Court responded as follows (324 F. 2d at 431) :

Appellants also assert that their grazing unit has been and is pledged as security for *bona fide* loans, and that therefore the Secretary may not terminate their grazing permit. As a basis for the assertion they rely upon the ["pledged as security" clause in] \* \* \* § 3 of the Taylor Grazing Act (43 U.S.C. § 315b) :

\* \* \* \* \*

Their contention is that if the Secretary may not refuse to renew a permit when the permittee's grazing unit is pledged as security for a *bona fide* loan, "he can hardly bring about the same result indirectly by terminating a permit prior to the expiration of the term \* \* \*." *As the contest shows, the provision relied upon by the appellants is one of the factors to be considered by the Secretary in establishing preferences between conflicting applications for permits on the federal range. By no means should it be construed as providing that, by maintaining a lien on his grazing unit, a permittee may also create and maintain a vested interest therein which will prevent the United States from exchanging it under § 8(b). (Italics added.)*<sup>5</sup>

As the decisions above indicate, the Department may refuse to renew a permit, even though the permittee's grazing unit is pledged as security for a *bona fide* loan and denial will impair the value of the grazing unit, when the public interest requires that the subject land be preserved from unnecessary injury, exchanged, disposed of, or reclassified for alternate public use. Similarly, we conclude that if the Department may deny renewal outright under the above circumstances, it is no less reasonable to hold that the Department may renew a permit for a lesser term pending completion of a Management Framework Plan and an Allotment Management Plan which are oriented not only to livestock grazing, but also to multiple use management which includes such concerns

as wildlife protection, water usage and conservation, environmental protection, and other resource management objectives which can be achieved by reclassification of national resource lands and control of grazing activity. *See NRDC v. Morton*, 388 F. Supp. 829 (D.D.C. 1974) (discussed *infra*); *cf. Jerry Tecklin*, 20 IBLA 308, 310 (1975); *Grindstone Butte Project*, 18 IBLA 16, 19 (1974). Furthermore, we find our conclusion consistent with 43 CFR 4115.2-6(b) which reads in pertinent part as follows:

*Pledge of licenses and permits as  
security loans*

\* \* \* \* \*

(b) A borrower-permittee desiring an extension of the term of his permit may file a request therefor, in writing, with the District Manager, setting forth the name of the lending agency, purpose and amount of loan, and the need for the extension of the permit term. *When it appears that such extension will be in accordance with applicable law and regulation and not contrary to the public interest, the District Manager, in his discretion, may extend the permit for a period not to exceed 10 years from the date of the loan, subject to the rules and regulations then in force and to such additional terms and conditions as the District Manager may provide. \* \* \** (Italics added.)

[2] We note also appellant's argument that the BLM never "denied the renewal" of grazing permits to Hat Ranch, Inc., as appellee was in fact offered 3-year permit renewals. The statutory clause immediately following the "pledged as security" clause reads: "Such permits shall be for a period

<sup>5</sup> The "pledged as security" clause was also noted, without elaboration, in *Brooks v. DeWar*, *supra* at 358; *Mollohan v. Gray*, 413 F. 2d 349, 352 n. 4 (9th Cir. 1969); *see also Joseph F. Livingston*, A-22362 (Dec. 18, 1939).

of *not more than ten years* \* \* \*." (Italics added.) The reference to ten years is clearly a ceiling measure, not an absolute, automatic privilege. See *United States v. Swanson*, 14 IBLA 158, 173, 81 I.D. 14, 21 (1974). Thus, at first glance it appears that the appellee secured renewal permits in conformance with the statute's requirements. However, despite such renewal, we are faced with Judge Mesch's determination that once the Department chooses to exercise its discretion and renew a permit which is pledged as security for a bona fide loan, it must, in the absence of a justifiable reason for doing otherwise, issue a new permit having an identical term as the original. The Judge concluded (Dec. at 3):

The District Manager asserts that the appellant has no cause for complaint because his decision provided that the permits would be renewed. I do not believe that a decision to issue a 3-year permit in lieu of a 10-year permit constitutes a renewal of "such permit" within the contemplation of Section 3 of the Act. The provision in Section 3 would be rendered meaningless if a 1-year permit or an annual license constituted the renewal of a 10-year permit.

We believe that Judge Mesch interpreted the meaning and scope of the pertinent section too narrowly, for when section 3 is examined as a whole it is clear that the term "such permit" is used interchangeably with the broader term "grazing permit" and does not carry the limiting construction attributed to it by the Judge. The word "such" means alike, similar, of that kind or class,

and represents the general object as already particularized; it is a descriptive word referring to a previous antecedent. See *C. J. Tower & Sons, Inc. v. United States*, 295 F. Supp. 1104, 1108 (Cust. Ct. 1969); *Rayonier, Inc. v. Polson*, 400 F. 2d 909, 919, n. 11 (9th Cir. 1968). In sec. 3 of the Act, the word "such" is used numerous times with reference to grazing permits, and it consistently refers in the more general sense to grazing permits issued in the discretion of the Secretary. In the specific clause recited by Judge Mesch, we find no basis for construing the language "such permit" to mean solely a renewal permit having identical features as the one previously issued.<sup>6</sup>

To demonstrate the difficulty with Judge Mesch's interpretation, one need only note that it leads to the conclusion that where the permittee has pledged his grazing unit as security for a bona fide loan, the Department would thereafter be restrained, despite public interest considerations, from altering any of

<sup>6</sup> Both parties quote extensively from the Senate floor debate on the pertinent section of the bill. An amendment relating to permits pledged as security for bona fide loans was first introduced by Senator McCarran of Nevada. 1934 CONG. REC. 1151-52 (Vol. 78, Pt. 10, 73d Cong., 2d Sess.). The subsequent Senate debate indicated that various Senators were concerned that the language of the amendment went too far as it could be construed to permit indefinite extension of a permit, beyond the period allowed by the permit, until the indebtedness was paid, and thus violated the purposes of the bill. Senator McCarran rejected the idea that the amendment should be so construed. 1934 CONG. REC. 1152-55 (Vol. 78, Pt. 10, 73d Cong., 2d Sess.). In response to the criticism, the language of the amendment was modified but the ambiguous language was not totally deleted.

the terms of a renewal permit such as the number of livestock to be grazed and the seasons of use. Such a construction of the Act would be in direct conflict with the statutory clause immediately following the "pledged as security" clause, which reads:

Such permits shall be for a period of not more than ten years, subject to the preference right of the permittees to renewal *in the discretion of the Secretary of the Interior, who shall specify from time to time numbers of stock and seasons of use.* (Italics added.)

See *Charles H. McChesney, supra*; cf. *United States v. Maher*, 5 IBLA 209, 79 I.D. 109 (1972). Furthermore, as specifically stated in *Alford Roos, supra*, even assuming the pertinent clause applied also to licenses, and the Department, in its discretion, renewed the license, there is nothing in the Act which assures the licensee the privilege of using *identical lands* theretofore allotted to him. See also, *Thomas Ormachea*, 73 I.D. 339 (1966). Analogously, we hold that the BLM may choose to renew a permit for an alternate term.

[3] The final question, then, is whether the decision to grant an alternative term of 3 years is reasonable and not arbitrary or capricious. Before we can undertake an independent analysis of that issue, we must consider the effect of the decision in *National Resources Defense Council v. Morton*, 388 F. Supp. 829, (D.D.C. (1974)), and the final judgment entered on June 18, 1975. The District Court determined that the Department

had not fully complied with the provisions of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.* (1970), because it continued issuing grazing privileges without preparation of adequate environmental land-use studies. The District Court Judge granted the plaintiff's motion for summary judgment and directed the Government and plaintiffs to work together in seeking a mutually satisfactory schedule for the preparation of environmental impact statements (EIS) covering lands affected by livestock grazing programs. On June 18, 1975, the Court accepted an agreement tendered by the parties which provided for a BLM program to develop Management Framework Plans (MFP) which would describe general management guidelines for land-use decisions. Each MFP would include a number of Allotment Management Plans (AMP) which would provide, in detail, permissible livestock grazing activities and alternate uses for the Federal range. The order provided the following:

7. Each EIS (environmental impact statement) contemplated by the agreement will discuss in detail "livestock grazing activities" and all reasonable alternatives thereto. "Livestock grazing activities" as used in this Order shall mean all existing or proposed livestock grazing, all grazing use authorizations issued or contemplated to be issued by BLM as well as those substantial activities which are supportive of and related to livestock grazing administered by BLM, such as fencing, livestock water development, spraying, chaining, seeding, and brush removal.

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8. Until an appropriate EIS is completed, *the Federal Defendants will adhere to the current policy of limiting authorizations for livestock grazing on any given area to an annual authorization basis, to the extent allowed by law.* (Italics added.)

The court's recognition of present BLM policy, of issuing 1-year licenses, was expressed in *NRDC v. Morton*, *supra*, at 839 n. 18.

Permits and leases for terms, generally 10 years, are made only after an AMP is agreed to between BLM and the grazer [*sic*]. The AMP is therefore a part of the term permit. *In areas for which no AMP has been prepared only annual licenses are issued.* (Italics added.)

In several recent cases the Board has recognized that the BLM is bound by the Court order of June 18, 1975, so long as it remains in effect. In one case the Board refused to cancel an outstanding permit on the grounds that it had been issued without complying with NEPA, *supra*, but it recognized that the Court's order controlled Departmental actions. *Sidney Brooks*, 22 IBLA 177 (1975). In a more recent case the Board held that application for renewal of a grazing lease which would have required road building and a well drilling for its utilization was properly denied until an acceptable environmental impact statement had been prepared pursuant to the Court's order. *Robert H. Jones*, 25 IBLA 93 (1976).

We also note in the Bureau's assessment of the *NRDC* decision in Instruction Memo. No. 75-407, August 22, 1974, the Director stated:

Although the court order will require a substantial effort on the part of the Bureau's personnel, the order itself will have little impact on the ongoing range program as it relates to our grazing authorizations. The court action does not prohibit or alter the issuance of licenses or leases at this time. Current term permits and leases will continue uninterrupted; however, all renewals will be on an annual basis until the necessary EIS for the allotment or lease area has been completed and a decision has been made concerning future livestock use on the area. \* \* \*

Accordingly, we find that pursuant to the Court's order the Hat Ranch's grazing permits can be renewed only on an annual basis.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision below is reversed and the case remanded for action consistent with the views set forth above.

MARTIN RITVO,  
*Administrative Judge.*

WE CONCUR:

FREDERICK FISHMAN,  
*Administrative Judge.*

DOUGLAS E. HENRIQUES,  
*Administrative Judge.*

DIXIE FUEL COMPANY  
GRAYS KNOB COAL COMPANY

7 IBMA 71

Decided November 9, 1976

Appeals by Dixie Fuel Company and  
Grays Knob Coal Company from an

initial decision dated Mar. 1, 1976, by Administrative Law Judge Joseph B. Kennedy in Docket Nos. BARB 76-32-P and BARB 76-33-P, respectively, assessing penalties for two violations of the Federal Coal Mine Health and Safety Act of 1969 in the amounts of \$2,500 and \$200, respectively.

### Affirmed.

#### 1. Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Roof Control Plans: Evidence

Where the undisputed evidence adduced by MESA established that the operator failed to have crossbars installed when hillseams are encountered as required by the roof control plan, the Mining Enforcement and Safety Administration made out a prima facie case of violation of sec. 302(a) of the Act. 30 U.S.C. § 862 (a) (1970). 30 CFR 75.200.

#### 2. Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Spalling Ribs

Neither the fact that a condition, such as spalling ribs, is difficult to control nor the fact that such a condition is a natural condition of the mining process precludes an inspector from properly issuing a notice of violation of 30 CFR 75.200. 30 U.S.C. § 862(a) (1970).

**APPEARANCES:** William A. Rice, Esq., for appellants, Dixie Fuel Company and Grays Knob Coal Company; Kahlman R. Fallon, Esq., Trial Attorney, for appellee, Mining Enforcement and Safety Administration

**OPINION BY ADMINISTRATIVE JUDGE SCHELLENBERG**

## INTERIOR BOARD OF MINE OPERATIONS APPEALS

### Background

The instant appeal was brought pursuant to section 109 of the Act<sup>1</sup> and involves violations of 30 CFR 75.200 by Dixie Fuel Company (Dixie) at its No. 1 Mine and Grays Knob Coal Company (Grays Knob) at its Mill Creek No. 2 Mine, both mines being located in Harlan County, Kentucky.

The language of 30 CFR 75.200 is identical to that of sec. 302(a) of the Act. 30 U.S.C. § 862(a) (1970). That part of the regulation relevant to both appeals reads as follows:

Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. \* \* \* No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. \* \* \*

Administrative Law Judge Joseph B. Kennedy (Judge) issued his decision on Mar. 1, 1976. Notices of Appeal were filed with the Board on Mar. 16, 1976, by Dixie and Grays Knob. On Apr. 12, 1976, an Order Granting Further Extension of Time to File Appellant's Brief was entered by the Board allowing

<sup>1</sup> 30 U.S.C. § 819 (1970).

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Dixie and Grays Knob until Apr. 25, 1976, to file briefs. A further extension was granted by the Board on May 5, 1976. On May 10, 1976, Dixie and Grays Knob filed appellate briefs.

On May 28, 1976, the Mining Enforcement and Safety Administration (MESA) filed with Board a "Brief for Appellee" with respect to that part of the Judge's decision pertinent to Grays Knob. On May 28, 1976, MESA filed a "Brief for Appellee" with respect to that part of the Judge's decision pertinent to Dixie.

### *Issues Presented on Appeal*

A. Whether Dixie Fuel Company violated 30 CFR 75.200, and if so, whether the Judge's findings with respect to the statutory criteria of section 109 of the Act are in error.

B. Whether Grays Knob Coal Company violated 30 CFR 75.200.

### *Discussion*

#### A.

The Dixie citation was issued by Clarence Parsons on Mar. 29, 1974, modifying a sec. 104(a) withdrawal order dated Mar. 27, 1974, which had been issued immediately after a fatal roof accident. Described therein is a condition allegedly violative of section 75.200:

An underground investigation of the fatal accident revealed that adequate roof support was not provided in the 1st left belt entry off No. 2 mains in an area where abnormal roof conditions were encountered. Abnormal conditions; the

presence of hillseams, the close proximity of the workings to the surface, reentering areas that had been repeatedly blasted, and where surface excavation was being performed were not properly recognized as hazards. Adequate safety precautions were not taken, in that, cross bars and/or other no less effective supplemental support was not provided as required by the approved Roof Control Plan (75.200).

The language of the Judge's bench decision with which Dixie takes issue reads:

One, the operator's failure to support the roof inby the hillseam in the 1 left section off 2 mains in the No. 1 Mine so as to prevent the roof fall that occurred on Mar. 27, 1974, and that resulted in the death or injury of three miners constituted a violation of section 305(a) [sic] of the Federal Coal Mine Health and Safety Act, 30 CFR 75.200.

I find this violation occurred whether or not the support posts was [sic] in compliance with the roof control plan because the undisputed facts show that the roof support furnished did not in fact and in the language of the Act, "control the roof adequately to protect the miners from falls of the roof." (Tr. 445-446.)

Dixie contends in substance that the weight of the evidence establishes that, before the accident occurred, the roof was adequately supported and further contends that the fact of a roof fall, standing alone, does not constitute a violation of the Act.

[1] It is undisputed that the roof in question was not supported by crossbars<sup>2</sup> where a hillseam<sup>3</sup> ex-

<sup>2</sup> At the hearing Inspector O'Roark cited as a requirement of Dixie's roof control plan the installation of additional support in the form

isted. Also undisputed is the fact that Dixie at no time had applied for a modification of its roof control plan which requires crossbars (Tr. 43) where hillseams are encountered. The record reveals that on three successive days Dixie representatives had been doing work at the hillseam where the fatal roof fall occurred (Tr. 410).

Applying our recent decision in *Affinity Mining Company v. Mining Enforcement and Safety Administration, United Mine Workers of America*, 6 IBMA 100, 83 I.D. 108, 1975-1976 OSHD par. 20,651 (1976),<sup>4</sup> to the instant facts, the

of crossbars or wooden members (Tr. 43). He explained the procedure thus:

"Q. In your opinion are \* \* \* timbers used when hillseams are encountered accepted mining practice?

"A. No sir, crossbars (Tr. 44).

\* \* \* \* \*  
 " \* \* \* these are three inch by eight inch wooden beams of varying length. You place them up against the roof and put a wooden post under for each leg. \* \* \*

"Q. You don't drive a roof bolt through?

"A. Sometimes you do.

"Q. What did this plan call for?

"A. This plan just required one post under each end of the crossbar" (Tr. 45).

<sup>3</sup> Inspector O'Roark defines a "hillseam" as a "Crack or break or fracture \* \* \* in the mine roof usually but not always associated with a visible seam of earth material that separates, between the crack, that separates the rock overlying the coalbed. And this will vary in consistency from just dirt that is compacted between the rock cavity and even down to oozing mud that often drops out" (Tr. 41).

<sup>4</sup>In *Affinity* the Board interpreted section 75.200 to mean:

" \* \* \* that an operator is not only obliged to have a program to improve the roof control system, but it must also implement the components of such program. \* \* \* the obligation to carry out a roof control plan is a mandatory safety standard and \* \* \* violation of a part of the plan is a violation of the standard \* \* \* the application of such standard is subject to modification under sec. 301 (c)." [6 IBMA 109, 111.]

Board determines that Dixie failed to implement that provision of its roof control plan requiring crossbars where a hillseam exists. Accordingly, we conclude that a violation of 30 CFR 75.200 did occur.

Having determined that a violation of the regulation was established by the weight of the record evidence, we need not address Dixie's second contention since it was not and is not a basis for the finding of violation.

With respect to the Judge's consideration of the six statutory criteria of sec. 109,<sup>5</sup> we are of the opinion that he made appropriate findings based upon the record considered as a whole and that the amount of \$2,500 assessed Dixie for the violation is not unreasonable.

## B.

A sec. 104(a) withdrawal order was issued on Apr. 5, 1974, by MESA Inspector James Browning (Order No. 1 JEB, 4-05-74), and described the following condition:

Sec. 75.200. Pillars were being extracted in 7 Right section where the coal height (12 to 13 feet) presented a hazard to workmen due to spalling ribs.

<sup>5</sup>Dixie admits that the hillseam was a "dangerous condition" (Appellant's Brief, p. 6) which caused the death of one miner and injury to two other miners. Accordingly, we agree with the Judge's conclusion that the violation was "extremely serious."

The Judge further found Dixie culpable of ordinary negligence, since Dixie knew of the violative condition. The Board finds that Dixie's contentions do not demonstrate any reason why the Judge's finding should not be affirmed with respect to the negligence criterion.

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On May 31, 1974, this withdrawal order was modified as follows:

Order No. 01-JEB dated 04-05-74 is hereby modified to permit production to be resumed to evaluate the effectiveness of an approved roof control plan which incorporated provisions for safe extraction of coal pillars in 7 right section.

On June 10, 1974, an order of termination was issued and stated that the condition set forth in Order No. 1 JEB, 04-05-74, had been totally abated. It succinctly states:

A new roof control plan has been submitted and evaluated and was found to be effective.

The Judge found that the afore-described condition did exist and constituted a violation of sec. 302 (a) of the Act (Tr. 106). With respect to the gravity criterion, he found the condition to be nonserious based upon the fact that "spalling is a natural condition that is very difficult to control," and the fact that attempts to clean up the condition by Grays Knob were made in good faith (Tr. 106). The Judge further found the violation to be a result of "slight negligence" and assessed Grays Knob a penalty in the amount of \$200 for the violation.

The language of sec. 75.200 alleged to have been violated reads:

\* \* \* The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. \* \* \* 30 U.S.C. § 862(a) (1970). [Italics added.]

After a careful reading of the record, the Board finds that MESA carried its burden of proof. Undis-

puted by Grays Knob is the fact that spalling ribs were present (Appellant's Brief, p. 5). Spalling ribs are defined, in the language of the MESA inspector, as " \* \* \* coal [being] rolled off the rib \* \* \* caused from pressure either from the bottom of the ribs [or from the top] \* \* \*" (Tr. 22).<sup>6</sup> The MESA inspector described the allegedly violative condition on examination—

A. Well, in the roadway which would be 1 right adjacent to the belt entry spalling ribs were present due from pressure. That is chunks of coal that has [sic] burst off the ribs in the belt entry. And in the entry adjacent to it (Tr. 41).

\* \* \* \* \*

Q. What size pieces were being spalled?

A. They varied from the size of your fist to two to three hundred pounds. It depended on just how it broke up (Tr. 24).

and on cross-examination by the operator's general manager—

A. \* \* \* these ribs had bursted up in chunks and had rolled out into your passageway. And you are taking weight across your pillar line. And in the immediate working area there they are popping and cracking and chipping off \* \* \* in chunks and small pieces, pretty good size chunks popping out on the pillar line. And this condition existed outby as you know for two or three crosscut lengths. (Tr. 59-60)

[2] The thrust of Grays Knob's argument is that since spalling ribs are a natural condition in pillar recovery mining and very difficult to

<sup>6</sup> A Dictionary of Mining, Mineral, and Related Terms (P. Thrush and Staff of Bureau of Mines, ed. 1968) under the term "spalling" states that:

"rock under excessive tension may \* \* \* spall, that is, throw off thin surface slabs."

control, no violation of the Act or the regulations promulgated thereunder can be found. That spalling ribs are a natural condition and difficult to control appears to be conceded by all parties. However, in our opinion, such concession does not get at the heart of the matter. We would not be fulfilling our obligation under the Act were we to view all adverse conditions in a mine as a natural product of some activity. Moreover, the degree of difficulty in abating or controlling adverse conditions should not be the criterion for whether the condition exists or is violative of some provision of the Act or regulations. The instant facts disclose ribs that were spalling chunks of coal weighing 200 to 300 pounds from a height of 12 to 13 feet. We are not convinced that the efforts of the operator cleaning up fallen pieces and/or pulling down loose ribs when, and if, detected, satisfy completely the requirement to support or otherwise adequately control the ribs. The record is not clear as to precisely what the operator was required to do to abate or what the operator did in fact do to abate. However, here again, the method of abatement is relatively unimportant since the fact is established that the condition was abated by the operator to the satisfaction of the MESA inspector and in the absence of evidence to the contrary we must assume that whatever was done now satisfies the requirement for support or adequate control to protect persons from falls of the ribs.

Based upon the foregoing, we find that Grays Knob failed to adequately control the subject ribs. We conclude, therefore, that Grays Knob violated 30 CFR 75.200.

Accordingly, we affirm the Judge's decision with respect to Docket No. BARB 76-32-P, Dixie Fuel Company, and Docket No. BARB 76-33-P, Grays Knob Coal Company.

### ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Judge's decision in the above-captioned case IS AFFIRMED and that Dixie Fuel Company pay a civil penalty in the amount of \$2,500 and Grays Knob Coal Company pay a civil penalty in the amount of \$200 on or before 30 days from the date of this decision.

HOWARD J. SCHELLENBERG, JR.,  
*Administrative Judge.*

WE CONCUR:

DAVID DOANE,  
*Chief Administrative Judge.*

LOUIS E. STRIEGEL,  
*Member of the Board.*

LEONARD R. McSWEYN

28 IBLA 100

Decided November 15, 1976

Appeal from decision of Montana State  
Office, Bureau of Land Management,

rejecting oil and gas lease offer M 33933.

**Affirmed as modified.**

### 1. School Lands: Generally—School Lands: Indemnity Selections

A State is entitled to indemnity for school lands which it did not acquire by reason of a fractional township. Where the fractional township is created by reason of the incursion of a navigable body of water, the State, by taking indemnity does not hereby grant to the United States the bed of the navigable body of water.

### 2. Navigable Waters—State Lands

The States possess dominion over the beds of all navigable streams within their borders.

### 3. Oil and Gas Leases: Lands Subject to—Navigable Waters—State Lands

An oil and gas offer embracing land in the bed of a navigable river, which is State land, is properly rejected.

**APPEARANCES:** Leonard R. McSweyn, Shepherd, Montana, pro se.

*OPINION BY ADMINISTRATIVE JUDGE FISHMAN*

### *INTERIOR BOARD OF LAND APPEALS*

Leonard McSweyn appeals from a decision dated Apr. 13, 1976, rendered by the Montana State Office, Bureau of Land Management (BLM), rejecting his oil and gas offer M 33933.

The decision below recited in pertinent part as follows:

Noncompetitive oil and gas application M 33933 describes by metes and bounds

a portion of the bed of the Yellowstone River adjacent to upland in Sec. 36, T. 23 N., R. 59 E., P.M.M.

It is true as set forth in IL List No. 40 the State of Montana did use the bed of the Yellowstone River as deficiency base for lieu selection. It is also true that for this deficiency base, among other base lands, the State of Montana selected the NE $\frac{1}{4}$  and E $\frac{1}{2}$  SW $\frac{1}{4}$  Section 11 in T., 4 S., R. 55 E., P.M.M. and to which they received title with no minerals reserved by the federal government. This we do not feel is the governing factor, but instead whether or not the Yellowstone River was navigable when the state entered the Union on November 8, 1889.

The question of navigability of the Yellowstone River has arisen many times and we have consistently held it was navigable from Billings downstream to its confluence with the Missouri. This being so, title to the bed of the river passed to the State of Montana upon the admission to the Union. The United States therefore owns no minerals and cannot issue an oil and gas lease.

Accordingly, your application is rejected in its entirety.

The appeal in pertinent portion states:

By decision, dated Apr. 13, 1976, 943.1: M33933, the Montana State Office rejected my Oil and Gas Application describing the bed of the Yellowstone River invading Section 36, Township 23 North, Range 59 East, P.M.M.

The State of Montana received title to all of the surveyed in place land in the above identified Section 36. Further, they used the bed of the river as base for Lieu Selection as evidenced by IL List No. 40. The United States did not reserve the minerals on Lieu Land selected by the State of Montana.

I agree the Yellowstone River was navigable where it invades Sec. 36, T. 23 N., R. 59 E., in 1889, which is the year Montana was admitted to the Union. This however, has no bearing on the decision at hand. The Interior Board of Land Appeals clearly held in David A. Province [sic], 15 IBLA 387 (IBLA 74-39, May 28,

1974), that where the State has used the bed of a body of water *as base for lieu selection* the United States owns the minerals underlying that body of water. That is exactly the situation we have for the case at hand.

[1] The right of a State to select public land as indemnity for losses in a fractional township of specific sections named in a grant of school lands to the State is measured by the acreage to which it is entitled computed in accordance with REV. STAT. § 2276, 43 U.S.C. § 852 (1970), less the acreage of the school lands in place in the fractional township. *State of Utah*, 68 I.D. 53, 55 (1961). It necessarily follows that the State is entitled to indemnity for lands which it owns other than potential school lands, in the school sec., *i.e.*, 16 and 36.

Sec. 10 of the Act of Feb. 22, 1889, 25 Stat. 676, 679, provides as follows:

Sec. 10. That upon the admission of each said States [Montana, North Dakota and South Dakota] into the Union sections numbered sixteen and thirty-six in every township of said proposed States, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools, such indemnity lands to be selected within said States in such manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided*, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time,

be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of the public domain.

REV. STAT. 2275 (1878), *as amended* by the Act of Feb. 28, 1891, 26 Stat. 796, provided:

SEC. 2275. Where settlements with a view preemption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory, in lieu of such as may be thus taken by pre-emption or homestead settlers. *And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: Provided*, Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory *shall be a waiver of its right to said sections. And other lands of equal acreage are also hereby appropriated and granted*, and may be selected by said State or Territory to compensate deficiencies for school purposes, where sections sixteen or thirty-

six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any nature cause whatever. \* \* \* [*Italics supplied.*]

It is clear that the statute draws a dichotomy between lands lost through prior appropriation and those lost through a "short" township. Obviously, it is only in the former case that claim to the "lost lands" title is given up by the State; in the latter case, the statute envisages no such action.

List No. 40 for the Miles City, Montana Land District, approved Aug. 17, 1922, shows that an indemnity selection was granted on the basis of a deficiency in a fractional township, *i.e.*, T. 23 N., R. 59 E. It follows that the State gave up no rights to the lands in that township by making the indemnity selection. *Provinse*, cited by appellant, is not controlling in the case at bar since it involves a nonnavigable lake.

[2] As BLM held, the State of Montana was vested with title to the bed of navigable rivers. Both BLM and appellant concede that the portion of the Yellowstone River in issue is navigable.

By a long-standing doctrine of constitutional law the States possess dominion over the beds of all navigable streams within their borders. *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845); *Shively v. Bowlby*, 152 U.S. 1 (1894).

The shores of navigable waters and the soils under them were not granted by the Constitution of the

United States, but were reserved to the States respectively; and the new States, *e.g.*, Montana, have the same rights, sovereignty, and jurisdiction over this subject as do the original States, *Pollard v. Hagan*, *supra* (headnote 3).

[3] It necessarily follows that an oil and gas offer embracing land underlying the navigable waters of a State must be rejected. *Rayford W. Winters*, A-28125 (January 15, 1960).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

FREDERICK FISHMAN,  
*Administrative Judge.*

I CONCUR:

ANNE POINDEXTER LEWIS,  
*Administrative Judge.*

**ADMINISTRATIVE JUDGE THOMPSON CONCURRING:**

Appellant's argument in this appeal rests upon a contention that the State, by taking indemnity based on fractional sections, has waived or conveyed its title to the bed of the navigable river to the United States. He rests his argument upon the case of *David A. Provinse*, 15 IBLA 387, 81 I.D. 300 (1974), which held that where a State had selected other lands in lieu of lands lying within the meander line of a nonnavigable lake adjacent to

granted upland school sections, it relinquished any interest in the land underlying the lake and within the meander line, citing *United States v. Oregon*, 295 U.S. 1, 10-11 (1935). The deficiency involved in the *Oregon* case pertained to the unsurveyed lake bed lands within the meander lines. The lake was held to be nonnavigable. Whatever title the State may have originally had to the lake bed was by virtue of its school land grant for the adjoining upland and the riparian rights which flowed from that grant.

As to the bed of a navigable body of water, such as in the case before us, the State's original title stems from the rule that "\* \* \* title to lands underlying navigable waters presumptively passes to the State upon admission to the Union \* \* \*." *United States v. Oregon, Id.* at 27. This is a consequence of the State's sovereignty and not because the lands are included in or are incident to a grant of adjoining uplands for school purposes. *Id.* at 14.

A waiver of title to the United States when a State obtains indemnity in lieu of granted lands is provided for by R. S. 2275, *as amended* by the General Indemnity Act, of Feb. 28, 1891, 26 Stat. 796, which provides in pertinent part:

SEC. 2275. Where settlements with a view to preemption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the use of schools or col-

leges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory, in lieu of such as may be thus taken by preemption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: *Provided, Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. \* \* \** [Italics added.]

The first sentence in the proviso italicized in the quotation above was modified by the Act of Aug. 27, 1958, 72 Stat. 928. The statute, codified as 43 U.S.C. § 851 (1970), now provides:

\* \* \* That the selection of any lands under this section in lieu of sections granted or reserved to a State or Territory shall be a waiver by the State or Territory of its right to the granted or reserved sections. \* \* \*

The waiver provision under the 1891 Act expressly referred to mineral land and land within reservations. The 1958 amendment broadened the waiver to the "selection of

any lands under this section in lieu of sections granted or reserved to a State or Territory." The indemnity selection in this case was in 1922. Therefore, the 1891 Act controls the effect of the State's selection. It would not seem that the waiver provision was applicable to the beds of the navigable bodies of water in this case in any event, since they do not appear to come within the categories listed under the 1891 Act. Further, it appears the indemnity provisions were for school land sections and not for lands underlying navigable bodies of water which the State took by virtue of its sovereignty.

A question could be raised as to the effect of the 1958 Act. Namely, whether the broadened waiver provision of that Act may be considered as applicable to any lands for which indemnity may be obtained, or as making a condition for a State to obtain indemnity irrespective of whether the State's title to the bed of land underlying water was by virtue of the fact the water is a navigable body of water, or as an incident to the State's title to adjoining uplands of a nonnavigable body of water in a fractional section of land, as in *Provinse* and *Oregon*, *supra*. This question need not be answered here.

I believe it is sufficient to rest our rejection of appellant's offer upon appellant's failure to show adequately that title to the land in this case rests in the United States. Where there is uncertainty of title,

the Secretary of the Interior, in his discretion, may refuse to issue an oil and gas lease for that reason. *Forest Oil Corp.*, 15 IBLA 36 (1974).

JOAN B. THOMPSON,  
*Administrative Judge.*

## ADMINISTRATIVE APPEAL OF DEAN HANSEN

v.

AREA DIRECTOR,  
ABERDEEN AREA OFFICE  
BUREAU OF INDIAN AFFAIRS

5 IBLA 250

Decided November 16, 1976

Appeal from a decision of the Commissioner, Bureau of Indian Affairs, affirming Area Director's action demanding trespass damages.

### DISMISSED.

#### 1. Indian Lands: Trespass: Damages

Notice and demand for collection of damages for trespass on Indian lands are prerequisites to filing suit in federal district court to collect damages for trespass and is not subject to appeal under 25 CFR Part 2.

#### 2. Rules of Practice: Appeals: Standing to Appeal

One having no right or privilege to the use or possession of Indian lands by way of a lease, permit or license has no standing to appeal under 25 CFR Part 2.

**APPEARANCES:** Wally Eklund, of Johnson, Johnson and Eklund for appellant, Dean Hansen, and Wallace

G. Dunker, Field Solicitor, for appellee, Area Director, Aberdeen Area Office.

*OPINION BY ADMINISTRATIVE JUDGE WILSON*

*INTERIOR BOARD OF INDIAN APPEALS*

Under date of May 28, 1976, the above-entitled matter was referred to the Hearings Division, Office of Hearings and Appeals, with directions that a fact-finding hearing be held before an Administrative Law Judge and for the issuance of a recommended decision.

Pursuant to said directive of May 28, 1976, a hearing was scheduled by Administrative Law Judge Michael L. Morehouse for Aug. 3, 1976, in Pierre, South Dakota. However, on July 22, 1976, the Field Solicitor, Aberdeen, South Dakota, Legal Counsel for the Area Director, Aberdeen Area Office, filed a motion with Judge Morehouse to dismiss the appeal for the following reasons:

1. The administrative action of the Superintendent, Crow Creek Agency, in his letter dated Apr. 3, 1975, to the Appellant, Dean Hansen, constituted a notice of livestock trespass upon Indian trust land, pursuant to 25 CFR Section 151.24.

2. In mandatory terms, Section 151.24, requires that "the Superintendent shall take action to collect all such penalties and damages and seek injunctive relief when appropriate."

3. Such letter was mailed certified, return receipt requested, and in addition to such notice, made official demand for the payment of penalty and damages as set forth in Section 151.24 in the total

amount of \$5,960.00 by Dean Hansen on grounds that his livestock were in trespass upon Indian trust lands.

4. Such notice and demand were prerequisite to legal action which has now been commenced pursuant to the request of such Superintendent and Area Director and referral to the United States Attorney by the undersigned.

5. The appeal procedures set forth in 25 CFR Part 2, provide for the "correction of actions or decisions of the Bureau of Indian Affairs where the action or decision is protested as a violation of a right or privilege of the Appellant."

6. Such notice and demand of the Superintendent related to an alleged wrong or violation of Dean Hansen of property rights of the Indian owners in the use and possession of Indian trust land and were unrelated to any right or privilege of the Appellant, Dean Hansen, as he held no right to the use or possession of such land by lease, permit, license, or otherwise.

7. By inadvertence, the Superintendent and Area Director acknowledged rights of appeal pursuant to 25 CFR Part 2, to be vested in the Appellant and they followed administrative procedures accordingly; however, the Appellant did not have any right of appeal regarding such notice and demand pursuant to a proper interpretation of such regulations.

8. The Appellant was instead submitting a "complaint" regarding the Superintendent's "notice" and "demand" by his affidavit and the letters and so called appeals of his attorney. A proper interpretation of 25 CFR Part 2, reveals that the appeal procedures therein set forth are not applicable to "complaints."

The Judge on Sept. 17, 1976, issued an order wherein he recommended dismissal of the appeal. The parties were granted 30 days from the receipt of said order in which to file briefs or exceptions thereto.

## ABERDEEN AREA OFFICE BUREAU OF INDIAN AFFAIRS

November 16, 17, 1976

The Aberdeen Field Solicitor, for and in behalf of the Aberdeen Area Director, on Sept. 29, 1976, filed with the Board reasons in support of the Judge's recommendation for dismissal of the appeal. The reasons are substantially the same as set forth in his motion to dismiss and are not repeated herein. No brief or exceptions to the recommended order were submitted by the appellant.

We are in agreement with the Judge's recommendation to dismiss dated Sept. 17, 1976. Accordingly, the Judge's recommendation to dismiss is hereby adopted. A copy of the Judge's recommended order of Sept. 17, 1976, is attached and made a part hereof.

There appears to be no need to repeat and expound on each reason set forth in support of the order recommending dismissal with the exception of the two items set forth below which we feel to be of great importance in support of the dismissal and worthy of reemphasis.

[1] That a notice and demand for a collection of damages for trespass on Indian lands are prerequisites to filing suit in federal district court to collect damages for trespass and is not subject to appeal pursuant to 25 CFR Part 2.

[2] That one having no right or privilege to the use or possession of Indian lands by way of a lease, permit, or license has no standing to appeal under 25 CFR Part 2.

For the reasons set forth in the Judge's order recommending dismissal and as reemphasized above,

the appeal herein should be dismissed.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1(2), the Administrative Appeal of Dean Hansen be, and the same is hereby DISMISSED.

This decision is final for the Department.

ALEXANDER H. WILSON,  
*Administrative Judge.*

WE CONCUR:

WM. PHILIP HORTON,  
*Board Member.*

MITCHELL J. SABAGH,  
*Administrative Judge.*

**RECOMMENDED ORDER**

*September 17, 1976*

[IBIA 76-26-A]

DEAN HANSEN, APPELLANT  
v.

BUREAU OF INDIAN AFFAIRS, APPELLEE

Appeal from a decision of the Area Director, Aberdeen Area Office Bureau of Indian Affairs, dated July 10, 1975.

**ORDER RECOMMENDING  
DISMISSAL OF APPEAL**

By letter dated Apr. 3, 1975, the Superintendent of the Crow Creek Agency notified appellant of a livestock trespass upon Indian trust land and assessed him \$5,960.00 pursuant to 25 CFR 151.24. Appellant answered on Apr. 29, 1975, through his attorney, requesting a hearing or in the alternative an appeal from this notice of assessment. Pursuant to

this request, a meeting was held on May 12, 1975, however, no settlement was accomplished at this meeting. On June 3, 1975, the Superintendent reasserted, by certified letter the assessment of \$5,960.00, which was appealed by letter dated June 11, 1975. On July 10, 1975, the decision of the Superintendent was affirmed by the Area Director, Bureau of Indian Affairs, and on July 15, 1975, appellant filed a notice of appeal to the Commissioner of Indian Affairs. Pursuant to 25 CFR 2.19(b), the matter was automatically referred to the Board of Indian Appeals since the Commissioner took no action on the appeal within the 30-day time limit. On May 28, 1976, the matter was referred to the Hearings Division, Office of Hearings and Appeals, with an order directing that a hearing be held before an Administrative Law Judge and, following the hearing, a recommended decision with findings of fact be submitted to the Board.

Pursuant to said order, hearing was scheduled for August 3, 1976, in Pierre, South Dakota, however, on July 22, 1976, the Office of the Solicitor, Department of the Interior, moved to dismiss the appeal and the hearing was continued indefinitely pending resolution of this motion. The basis of said motion is:

1. The Superintendent's letter of Apr. 3, 1975, was, in effect, a prerequisite to filing suit in Federal District Court to collect damages for trespass.

2. Appellant's appeal from this notice and demand was, in effect, a "complaint" and the rules governing rights of appeal in 25 CFR 2.1 *et seq.* are not applicable to "complaints".

3. The Superintendent and Area Director acknowledged appellant's right of appeal pursuant to 25 CFR, Part 2, by inadvertence when, in fact, no such right existed.

4. The appeal should be dismissed for lack of jurisdiction based on the above, such dismissal in no way to jeopardize the rights of appellant in the defense of

any action commenced by the United States for the recovery of trespass damages.

The motion is unopposed. In addition, advice has been received that the United States has filed suit against appellant, Civil No. 76-3038, in Federal District Court for the District of South Dakota, Central Division, for trespass damages.

For the above reasons, it is recommended that an order be entered dismissing the appeal.

MICHAEL L. MOREHOUSE,  
*Administrative Law Judge.*

**DONALD PETERS**  
**(ON RECONSIDERATION)**

28 IBLA 153

Decided November 23, 1976

Petition for reconsideration of the Board's decision, styled Donald Peters, 26 IBLA 235, 83 I.D. 309 (1976).

Decision sustained.

**1. Alaska; Native Allotments—Rules of Practice: Appeals: Reconsideration**

Where a petition for reconsideration of a previous Board decision applying departmental contest procedures to Alaska Native allotment applications fails to show that the original decision was erroneous in any matter, the original decision will be sustained.

**APPEARANCES:** Norman A. Cohen, Esq., Alaska Legal Services Corporation, Bethel, Alaska, and Donald Juneau, Esq., Alaska Legal Services Corporation, Anchorage, Alaska, for appellant.

November 23, 1976

OPINION BY CHIEF  
ADMINISTRATIVE  
JUDGE FRISHBERG  
INTERIOR BOARD OF  
LAND APPEALS

On Sept. 24, 1976, Donald Peters, through the Alaska Legal Services Corporation, filed a petition for reconsideration of the Aug. 17, 1976, decision rendered by this Board in the above-captioned case, found at 26 IBLA 235, 83 I.D. 309. In that decision this Board, *en banc*, ruled that upon a determination by the Bureau of Land Management (BLM) that an Alaska Native allotment application should be rejected for failure to use and occupy the land sought in conformity with the Native Allotment Act of May 17, 1906, 34 Stat. 197, *as amended*, 43 U.S.C. §§ 270-1 through 270-3 (1970), BLM was to issue a contest complaint pursuant to 43 CFR 4.451 *et seq.* The decision further stated that upon receipt of a timely answer the case would be referred to the Hearings Division, Office of Hearings and Appeals, for the assignment of an Administrative Law Judge, who would schedule a hearing at which the applicant would be afforded an opportunity to produce evidence and give testimony that would show his entitlement to the allotment. This procedure was adopted by the Board in view of the decision of the Ninth Circuit Court of Appeals in *Pence v. Kleppe*, 529 F.2d 135 (9th Cir. 1976).

It is difficult to understand the gravamen of appellant's petition,

aside from counsel's objection to the alleged technical and formal nature of the Department's contest procedures and 30-day answer requirement under 43 CFR 4.450-7(a). Apparently, appellant's counsel argue that because "[t]he court rejected existing departmental procedures as not comporting with due process" (Pet. for Recon., at 1), and because "existing departmental procedures" include "technical and formal" contest procedures (*Id.* at 4), the Board, in applying those contest procedures to Native allotment applications, "violated the District Court's Order and the Ninth Circuit's decision in *Pence*." (*Id.* at 4.)

The fatal flaw in this argument is the fact that the procedures referred to by the Ninth Circuit as not providing due process are *not* the departmental contest procedures. Rather, to use the words of the court quoted by counsel, those procedures are "the present on-site inspection procedure[s]." *Pence v. Kleppe*, 529 F.2d 135, 142 (9th Cir. 1976). As stated by the court:

The Secretary contends that the current procedures used do meet the requirements of due process. He reasons that because an applicant may accompany the field examiner and the examiner is instructed in the customs and patterns of Native land use, the present on-site inspection procedure is the best way to uncover the truth. We agree that the procedure is useful, but do not agree that it provides the due process that is required.

The court then proceeds to discuss the need for notice and op-

portunity for hearing, summarizing as follows:

Thus, at a minimum, applicants whose claims are to be rejected must be notified of the specific reason for the proposed rejection, allowed to submit written evidence to the contrary, and, if they request, granted an opportunity for an oral hearing before the trier of fact where evidence and testimony of favorable witnesses may be submitted before a decision is reached to reject an application for an allotment. Beyond this bare minimum, it is difficult to determine exactly what procedures would best meet the requirements of due process. The specific problems involved and the demands placed upon the Bureau of Land Management are best judged initially by the Secretary. It is up to the Secretary, in the first instance, to develop regulations which provide for the required procedures, subject to review by the district court and, if necessary, by this court.

*Id.* at 143.

After quoting this language, appellant's counsel state:

*Despite this clear language as to the kind of fair hearing to be employed, I.B.L.A. \* \* \* has decreed that the contest procedure in 43 CFR §§ 4.450 and 4.451 be used on those cases where the applications are rejected \* \* \*. [Italic supplied.]*

Pet. for Recon. at 3.

Next, counsel complain that because of the strictness of these procedures, especially the 30-day answer requirements, they are inappropriate to Alaska. Finally, they conclude:

While I.B.L.A. seems over-concerned with adherence to nit-picking bureaucratic ukases, it seeks to avoid complying with the clear mandate of the Ninth Circuit. \* \* \* In ignoring the Ninth Cir-

cuit's directive, and enacting the technical and formal requirements of the contest procedure, I.B.L.A. has violated the District Court's order and the Ninth Circuit's decision in *Pence*.

*Id.* at 3-4.

It was precisely *because* of the holding of the court that the Board applied contest procedures to Native allotment applications. This is made abundantly clear in our decision of August 17, 1976. As stated therein:

This Department has generally applied procedures consonant with the requirements of the APA [Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (1970)] when it has been determined that due process requires notice and an opportunity for hearing, and it shall do so here.

26 IBLA at 239.

Counsel have not shown wherein the departmental contest procedures deviate from the standards of notice and opportunity for hearing prescribed by the court. These procedures have been applied to mining locations, homesteads and other land entries in Alaska for decades, without objection.

If counsel for appellant are now contending that a hearing before an Administrative Law Judge entails an undesirable formality and rigidity, this marks a major departure from the position which Alaska Legal Services Corporation, representing Native allotment applicants, has taken before this Board. For the convenience of appellant's counsel we have appended to this decision a list of those cases, presently pending before this Board, in which attorneys in Alaska Legal Services

November 23, 1976

Corporation have filed motions requesting this Board to remand the case for a fact-finding hearing pursuant to 43 CFR 4.415. Hearings ordered under 43 CFR 4.415 are conducted pursuant to the regulations found in 43 CFR 4.430 to 4.439. As an examination of those regulations makes clear, the procedures followed in conducting those hearings are virtually identical with those which are utilized in a contest hearing with one exception relevant herein, which we will discuss *infra*. It is difficult to give credence to appellant's counsel's anguished objections to the formal nature of the contemplated hearings when it is precisely the type of hearing which they had previously sought.

It must be borne in mind that in *Pence*, Alaska Legal Services Corporation was seeking a hearing procedure consistent with the Due Process Clause of the Fifth Amendment and sought to invoke the court's jurisdiction under sec. 10 of the Administrative Procedure Act, *as amended*, 5 U.S.C. §§ 701-706. Specifically, plaintiffs contended that the procedures then followed by the Secretary violated their right to due process under the Fifth Amendment by failing to provide them with "an opportunity to be heard, present testimony, and to confront and cross-examine adverse witnesses at a hearing \* \* \*."

Indeed, we would point out that in a brief filed in support of the appeal of Native allotment applicant Warner Bergman, F-17109, Alaska Legal Services Corporation argued

that principles of equal protection required that allotment applicants be given the same contest hearing rights afforded homestead and trade and manufacturing site entrymen and claimants, specifically citing 43 CFR 4.450 *et seq.* Therein counsel stated:

\* \* \* It would be a gross denial of equal protection of the laws to guarantee the right to a hearing on contested issues of fact to Homestead, Trade and Manufacturing site, desert entry, mining, etc., applicants, but not to a Native Land Allotment applicant when the Land Allotment applicant has a protected property interest also. \* \* \*

In that brief the Alaska Legal Services Corporation attorneys also discussed the argument that "fair hearings would be needlessly cumbersome and expensive." They answered this contention by noting that "the fact that a procedure demanded by due process may be cumbersome and expensive to the government does not free the government of its obligation to comply with that procedure." *Citing Goldberg v. Kelley*, 397 U.S. 254, 265-66 (1970). In short, counsel for Alaska Legal Services Corporation now contend that what they heretofore argued was required by due process has become, for some unarticulated reason, violative of due process.

The one manner in which hearings under the contest procedures differ from those held under 43 CFR 4.415 is also the second gravamen of appellant's petition: there is no requirement that a contest complaint be answered within 30

days in a 43 CFR 4.415 hearing. The reason for this omission is, of course, obvious. A discretionary hearing under 4.415 commences only after the case has already been appealed to the Board, and the Board, in its order referring the case for a hearing, prescribes the issues to be litigated on the basis of the record and contentions of the parties already before it.

A hearing by right under the contest procedures, on the other hand, is initiated not by actions of this Board, but by actions of the Bureau of Land Management in filing a contest complaint. It is the nature of all complaints that failure to deny the elements of the complaint works a constructive admission of the truth of the complaint. The question is in what time-frame failure to respond can be said to constitute an admission of the charges of the complaint.

The regulations governing contest complaints are found at 43 CFR 4.450 *et seq.* Regulation 4.450-6 provides that "[w]ithin 30 days after service of the complaint \* \* \* the contestee must file in the office where the contest is pending an answer specifically meeting and responding to the elements of the complaint \* \* \*." Appellant's counsel advert to federal court cases which have affirmed decisions of the Department requiring strict adherence to this procedural requirement. They then state that "[i]n view of this strict requirement, the inappropriateness of such a procedure to Alaska would seem to be obvious because of the transportation and

communications difficulties within the state." Pet. for Recon. at 3.

This argument, if meritorious, would compel the logical conclusion that the contest procedures are inapplicable within the State of Alaska not only in Native allotment hearings but in mining claim and homestead contests as well. The Department, however, has always applied the regulations concerning contest procedures equally to Alaska and the lower 48 States. Compare *Ideal Basic Industries, Inc. v. Morton*, No. 74-2298 (9th Cir., Sept. 28, 1976), and *Nelson v. Kleppe*, 529 F.2d 164 (9th Cir. 1976), with *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963), and *Reed v. Morton*, 480 F.2d 634 (9th Cir. 1973). Counsel's position would require the amendment of all contest procedures as they apply to Alaska.<sup>1</sup>

While appellant's attorneys allude to decisions of federal courts affirming the imposition of the 30-day answer requirement, *viz.*, *United States v. Weiss*, 431 F.2d 1402 (10th Cir. 1970); *Sainberg v. Morton* (identified in their brief as *Sandberg v. Morton*), 363 F. Supp. 1259 (D. Ariz. 1973), they avoid any discussion of the rationale which led

<sup>1</sup> With regard to the problems of climatology in Alaska and the rigors of its winters we note that the Ninth Circuit Court of Appeals has taken judicial notice, albeit in a different circumstance, "of the fact that the rigors of a North Dakota winter may be no less severe than those of Anchorage, Alaska." *Nelson v. Kleppe*, 529 F. 2d 164, 168 (1976). We also note that there are many areas in such states as Montana and Nevada which are remote from the conveniences of modern technology. Many mineral claimants and others have been unable to afford legal counsel and have been required to proceed *pro se*.

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the Secretary to adopt the regulation and the courts to affirm it. In *Sainberg* the court stated:

The Secretary's rules are reasonable in giving a period of thirty days in which to file an answer. In order to carry out an orderly system of justice the Secretary has not established a grace period<sup>2</sup> or retained discretion in the application of the regulation. Plaintiffs ask this Court to require the Secretary to waive his own mandatory regulation because the answer was filed one day late as a "result of mistake, inadvertence and excusable neglect." Nowhere in the regulations is the authority given the Secretary to waive his regulations because of excusable neglect or mistake. The defendant is required to abide by his own regulations, so are plaintiffs. If the time requirement was waived this would disturb the Secretary's long-standing procedure of administering the mining laws and other land laws fairly. The regulations would be a farce if they could be applied only if and when the parties felt like complying therewith.

363 F. Supp. at 1263.

Moreover, appellant's counsel appear to misconceive the nature of a complaint and the denial thereof which is necessary to trigger the adversary hearing. Obviously, the purpose of a complaint is to give notice to the applicant of the issues being contested. Generally, the complaint would allege the invalidity of an allotment application for a specific reason or reasons. The applicant is then given an opportunity to respond. A simple denial of the

truth of the allegation (e.g., "Applicant denies each and every allegation contained in the complaint."), or an assertion of use and occupancy sufficient to qualify for an allotment, is all that would ordinarily be needed to raise an issue of fact requiring a hearing.<sup>3</sup>

It is true that such a denial must be transmitted within 30 days of receipt of the complaint. But appellant's attorneys apparently have forgotten that in order to appeal any adverse decision to this Board a notice of appeal must also be transmitted within 30 days of receipt of the decision appealed. 43 CFR 4.411. We are aware of only a single Native allotment case presently before this Board in which appellants failed to file timely a notice of appeal from a decision of the BLM adverse to their allotment application.<sup>4</sup> We are unable to per-

<sup>3</sup> Subject to agreement by the other parties, Native allotment applicants may waive a hearing. 43 CFR 4.450-7(b). However, the applicant must still answer the contest complaint timely.

<sup>4</sup> Another recent case originating in Alaska which dealt with the question of a timely filing of the notice of appeal was the appeal of *George James*, IBLA 76-6. To briefly summarize the facts of that case, James' allotment application was rejected by the Alaska State Office, BLM, for failure to submit adequate proof of use and occupancy of the lands sought in the allotment application. The decision was served on appellant and received and signed for by him on a specified date. Though the case file indicated that a copy of the decision was also sent to his legal representative, an attorney with Alaska Legal Services Corporation, the attorney subsequently alleged that he had not received notice until after the expiration of the period in which to file a notice of appeal computed from the date on which the allotment applicant received the notice. This Board, rather than relying on the presumption of regularity which attends the

(Continued)

<sup>2</sup> This is not entirely accurate. In *Sainberg* the answer was hand-carried to the BLM office and filed 1 day late. The 10-day grace period provided by 43 CFR 4.422(a) applies to the filing of all pleadings, including answers, where they are otherwise transmitted within the 30-day period.

ceive how requiring a simple denial of an allegation would result in a more onerous burden than that which existed before, and which, with few exceptions, has been consistently met.

We would also point out that the Alaska and Federal Rules of Civil Procedure provide that failure to answer a civil complaint within 20 days permits the complaining party to move for the entry of default and a judgment thereon. *See* Alaska R. Civ. P. 4(b), 4(e)(5), 12(a), 55(a), Form 1. *See also* Fed. R. Civ. P. 4(b), 12(a). Admittedly, there are procedures for setting aside a default for mistake, inadvertence, surprise and excusable neglect (Rule 60), but surely neither the State of Alaska nor the federal courts would have adopted a 20-day period for answering a civil complaint if it did not feel that a 20-day period for answering a civil complaint should normally be adequate. Furthermore, it should be noted that Federal Rules of Appellate Procedure provide no special rule for Alaska regarding the taking of an appeal from a decision of a Federal District Court. *See* Fed. R. App. P. 4(a), 5(b).

day-to-day workings of the BLM (*see* A. G. Golden, 22 IBLA 261 (1975)), accepted as true appellant's attorney's representation and reinstated the appeal by Order of Oct. 26, 1976.

Similarly, in a number of cases recently brought to this Board's attention, notices of appeal which had been rejected because they were improperly filed by the Superintendent, Anchorage Agency, BIA, were held to have been revitalized by the timely entry of qualified attorneys. *See e.g., John Moore*, IBLA 70-526, Order of Nov. 11, 1976.

Finally, it is argued that much of the alleged difficulty in the application of the contest procedures to cases in Alaska arises from the fact that the Native applicants often reside in remote areas and, as the court in *Pence v. Kleppe*, *supra*, noted, many Alaska Natives "are even less educated and literate than most American welfare recipients." 529 F. 2d at 142. What cannot be ignored, however, is the fact that there are presently pending before this Board only five cases in which the Native allotment applicant is not represented by counsel, in the overwhelming number of cases, Alaska Legal Services Corporation.<sup>5</sup>

In response to an inquiry from this Office, the Alaska State Director, BLM, in a memorandum, dated October 26, 1976, informed this Board that in approximately 95 percent of the cases presently pending before it the allotment applicant is represented by counsel of Alaska Legal Services Corporation, and that of the remaining cases, private counsel has been retained in a few of them. We also note that in a motion filed on November 1, 1976,

<sup>5</sup>One exception is the appeal of *Ester Thorson*, IBLA 75-663(d), in which Alaska Legal Services Corporation originally represented the applicant, but subsequently withdrew from the case. The appeal of the *Heirs of Ernest L. Olson*, IBLA 76-238, and the appeal of the *Heirs of Migley Kelly*, IBLA 75-639, are being handled by the Superintendent of the Anchorage Agency, Bureau of Indian Affairs, pursuant to his obligation to conserve the estates of deceased Natives. *See Thomas S. Thorson, Jr.*, 17 IBLA 326 (1974). The Native allotment applications of *James Sims*, IBLA 74-53, and *Walla McCarr*, IBLA 76-390, are being pursued *pro se*.

by Alaska Legal Services Corporation in an appeal filed by the State of Alaska, IBLA 76-715, counsel stated, " \* \* the Alaska Legal Services Corporation represents most all of the Native allotment applicants in the State of Alaska which fact is well known to the State of Alaska \* \* \*." Accordingly, in the overwhelming number of cases the contest complaint will be served on attorneys, 43 CFR 4.22 (b), and the problems which allegedly emanate from the remoteness and educational status of the Natives will not arise.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the original decision in *Donald Peters*, 26 IBLA 235, 83 I.D. 564 (1976), is sustained.

NEWTON FRISHBERG,  
*Chief Administrative Judge.*

MARTIN RITVO,  
*Administrative Judge.*

EDWARD W. STUEBING,  
*Administrative Judge.*

JOAN B. THOMPSON,  
*Administrative Judge.*

WE CONCUR:

JAMES R. RICHARDS,  
*Director, Office of Hearings, and Appeals, Ex-officio Member of the Board.*

FREDERICK FISHMAN,  
*Administrative Judge.*

DOUGLAS E. HENRIQUES,  
*Administrative Judge.*

ANNE POINDEXTER LEWIS,  
*Administrative Judge.*

APPENDIX

Request for Hearing (43 CFR 4.415)

75-462(a)	John Coopchiak	AA 6355
75-462(b)	Anecia Kritz	AA 7442
75-462(c)	Anuska Bavilla	AA 7404
75-462(d)	Sam Fullmoon	AA 7410
75-497	Mary Kanulie	AA 7441
75-501	Dorothy Titus	F 14538
75-520(c)	Flora Myomick	F 16239
75-663(c)	Henry Pavian	AA 7266
76-48	Alburn A. Anderson	F 16287
76-49	Pauline Dennis Esai	F 1722
76-66	Freda W. Smith	F 18383
76-74	Sarah A. Pence	F 13735
76-86	Olick Ignaty	F 17075
76-172	Frederick Carl Phillips	AA 7608
76-177	Sando Wasuli	F 16411
76-197	James R. Showalter	F 15467

## APPENDIX—Continued

76-212	Mary Bobby	F 16998
76-222	Nicholas A. Charles	F 13872
76-224	Agnes T. Hoelscher	F 16142
76-225	Blanche Alfred	F 17054
76-226	Henry Frank	F 17061
76-227	Mary Bobby	F 16490
76-228	Nick Bobby	F 16491
76-229	Nastasia Evan	F 16494
76-232	Elena A. Triplett	F 17222
76-233	David Mann	F 17215
76-234	Paul S. Phillips	AA 7605
76-235	Jean F. Ferris	F 16225
76-236	Mary F. Romer	F 18203
76-239	Cecelia Nick	F 19199
76-250	Joseph Odinzoff	F 16387
76-253	James Lockwood	F 18031
76-254	Timothy Snowball, Sr.	F 16045
76-255	Florence Newman	F 12611
76-256	Alice Gusty	F 16495
76-261	Della Charles	F 15898
76-273	Mary Alice Kawagley	F 16148
76-286	Ellamae A. Chaney	AA 8279
76-308	Marvare Zaukar	F 16497
76-310	Trimble Gilbert	F 12606
76-321	Annie David	F 16135
76-322	Helen A. Jack	F 16377
76-323	Katherine R. Willie	F 16049
76-325	Franklin Tritt	F 17443
76-344	Christian Tritt	F 025831
76-350	Walter Chulin	AA 8202
76-351	Alexandra Matsuno	AA 7901
76-381	Arthur R. Martin	AA 7889
76-386	Arthur J. Demmert, Sr.	AA 7873
	Patrick Gardner	AA 7815
	Gabriel D. George	AA 6575
	Norman Jackson	AA 7867
	Thomas Jackson, Jr.	AA 7868
	Roger Howard, Sr.	AA 6604
	Johnny Jack, Sr.	AA 7728
	Willie Jack, Sr.	AA 7733
	Franklin R. James	AA 7629
	Andrew Jim	AA 8001
	Charlie Jim, Jr.	AA 7995

## APPENDIX—Continued

76-386	Frank Jim	AA 7999
	Jennie Jim	AA 8156
	Joseph B. Jim	AA 7886
	Martin Johnson	AA 7886
	Moses Johnson	AA 7734
	Stella Brown Adams	AA 7897
	William H. Samato, Sr	AA 7890
	Michael Jackson	AA 7804
	Claudine Laws	AA 7727
76-388	Woodrow W. Morrison	AA 7916
	William G. Demmert	AA 7893
	Patricia C. Ware	AA 7632
	Melvin James	AA 7631
76-389	Cecilia Foxie	F 18751
76-399	John O. Nerby, Jr	F 16154
76-415	Rex Mathlaw, Sr	F 18463
76-416	Fannie (Brown) Neligan	AA 7957
76-417	Joseph J. Link, Jr	F 16150
76-418	Susan A. Riley	F 16159
76-427	Larry Sullivan	AA 7876
76-428	Warren Sheakley, Sr	AA 6549
	Amy G. Walker	AA 7731
	Mary B. Johnson	AA 8017
	Paul F. James	AA 7749
76-436	Benjamin Lindgren, Sr	AA 8235
76-437	George Waska	F 18285
76-438	George E. Williams	A 061299
76-452	Stanislaus Mike	F 16385
76-507	George W. Nelson, Jr	AA 7730
76-508	Jacob White, Sr	AA 8013
76-534	Benson Kadake	A 060671
76-578	Peter Waska	F 13269

ADMINISTRATIVE JUDGE GOSS  
CONCURRING:

I concur in the result. Petitioner seems to have the impression that in response to a petition for reconsideration the Board of Land Appeals has authority to amend departmental regulations. While the Office of Hearings and Appeals is properly concerned with Department

rules, it is the function of the Board to interpret existing statutes and regulations as guided by its authority and by judicial and departmental precedents. I believe that the decision herein was an appropriate interpretation and application of present regulations.

JOSEPH W. GOSS,  
*Administrative Judge.*

**ALABAMA BY-PRODUCTS  
CORPORATION  
(ON RECONSIDERATION)**

7 IBMA 85

Decided November 23, 1976

Petition by the United Mine Workers of America for reconsideration of the Board's opinion and order affirming a decision by Administrative Law Judge Painter in Docket Nos. BARB 75-608 and BARB 75-609 vacating orders of withdrawal issued under sec. 104(c)(1) of the Federal Coal Mine Health and Safety Act of 1969.

Decision below set aside and case remanded.

**1. Federal Coal Mine Health and Safety Act of 1969: Unwarrantable Failure: Notices of Violation**

A violation of a mandatory standard is not "of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard" if it poses either a purely technical instance of noncompliance or a source of any injury which has only a remote or speculative chance of coming to fruition.

30 U.S.C. § 814(c)(1) (1970).

**2. Federal Coal Mine Health and Safety Act of 1969: Unwarrantable Failure: Notices of Violation**

A notice of violation may be issued under sec. 104(c)(1) without regard for the seriousness or gravity of the injury likely to result from the hazard posed by the violation, that is, an inspector need not find a risk of serious bodily harm, let alone of death.

30 U.S.C. § 814(c)(1) (1970).

Board decision, *Alabama By-Products Corporation*, 6 IBMA 168, 1975-1976 OSHD par. 20,756 (1976), set aside.

Board decisions, *Eastern Associated Coal Corporation*, 3 IBMA 331, 81 I.D. 567, 1974-1975 OSHD par. 18,706 (1974), and *Zeigler Coal Company*, 4 IBMA 139, 82 I.D. 221, 1974-1975 OSHD par. 19,638 (1975), overruled in part.

**APPEARANCES:** Steven B. Jacobson, Esq., for appellant, United Mine Workers of America; David Barbour, Esq., Trial Attorney, for appellee, Mining Enforcement and Safety Administration; Fournier J. Gale, III, and J. Fred McDuff, Esqs., for appellee, Alabama By-Products Corporation; L. Thomas Galloway, Esq., and Joseph Onek, Esq., for amicus curiae, Council of the Southern Mountains, Inc.

**OPINION BY CHIEF ADMINISTRATIVE JUDGE DOANE**

**INTERIOR BOARD OF MINE OPERATIONS APPEALS**

Alabama By-Products Corporation (Alabama) instituted these proceedings in order to challenge the legal sufficiency of Orders of Withdrawal 1 CLM and 1 DWP which were both issued on October 24, 1974, pursuant to sec. 104(c)(1) of the Federal Coal Mine Health and Safety Act of 1969.<sup>1</sup> Among

<sup>1</sup> The mandatory standards cited in the subject withdrawal orders were 30 CFR 75.403 and 30 CFR 75.603, respectively.

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other things, Alabama contested each of these withdrawal orders on the ground that the underlying notice of violation, denominated 3 CLM, Oct. 23, 1974, was invalid. In attacking the notice, which cited an alleged violation of 30 CFR 75.400, Alabama argued that it contained an erroneous finding; to wit, that such “\* \* \* violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard \* \* \*.”

Following our decisions in *Eastern Associated Coal Corp.*, 3 IBMA 331, 81 I.D. 567, 1974-1975 OSHD par. 18,706 (1974), and *Zeigler Coal Company*, 4 IBMA 139, 82 I.D. 221, 1974-1975 OSHD par. 19,638 (1975), Administrative Law Judge Painter concluded that there was merit in Alabama's argument. He did so on the basis of a finding that the cited violation did not pose a probable risk of serious bodily harm short of imminent danger. Subsequently, we affirmed. 6 IBMA 168, 1975-1976 OSHD par. 20,756 (1976).

This appeal is now before us pursuant to an order by the Board, issued on June 21, 1976, staying *sua sponte* the final effect of its decision pending reconsideration. Reconsideration was ordered so that the Board could gauge the impact on this case, if any, of the recent decision of the United States Court of Appeals for the District of Columbia Circuit reversing *Zeigler Coal Company*, *supra*, *Int'l Union, United Mine Workers of America*

(*UMWA*) v. *Kleppe*, 532 F.2d 1403 (D.C. Cir. 1976), *cert. denied sub nom, Bituminous Coal Operators' Assn., Inc. v. Kleppe*, — U.S. — No. 76-40 (Oct. 5, 1976).

### *Issue on Reconsideration*

Whether, in light of the Court's decision in *UMWA v. Kleppe*, *supra*, the Board is obliged to change its construction of the gravity condition precedent to the issuance of sec. 104(c) (1) notices of violation and to remand for further fact finding.

### *Discussion*

[1, 2] Sec. 104(c) (1) of the Act requires a federal coal mine inspector to issue a notice when he finds a violation of any mandatory standard exhibiting several enumerated characteristics. One of these characteristics is that the violation in question must be “\* \* \* of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard \* \* \*.” This characteristic is obviously a gravity requirement of some kind as everyone involved in this case agrees. 30 U.S.C. § 814 (c) (1) (1970).

Sec. 104(c) (1) further requires an inspector to issue a withdrawal order upon the finding of a subsequent violation of any mandatory standard provided that such violation is caused by an “unwarrantable failure to comply” and is found during the same inspection or within 90 days of the issuance of the un-

derlying notice. There is no *express* gravity prerequisite for the issuance of a sec. 104(c)(1) withdrawal order.<sup>2</sup>

Initially in *Eastern Associated Coal Corp.*, *supra*, and again in *Zeigler Coal Company*, *supra*, we concluded that the above-quoted gravity requirement was an *implied* prerequisite for the issuance of a sec. 104(c)(1) withdrawal order. Moreover, we concluded that an inspector is only justified in finding that a violation is “\* \* \* of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard \* \* \*” if he first finds that such violation poses a probable risk of serious bodily harm or death short of *imminent* danger.

<sup>2</sup> Sec. 104(c)(1) provides as follows:

“If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any notice given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within ninety days after the issuance of such notice, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsec. (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.”

In reversing *Zeigler Coal Company*, *supra*, the Court of Appeals held that there was no implied gravity prerequisite for the issuance of a sec. 104(c)(1) withdrawal order. Having so concluded, the Court had no reason to reach the alternative question, presented here, of whether we had correctly construed the statutory phrase in question, and in fact, the Court said nothing about it.

Pointing out the narrowness of the Court's holding and underscoring the Court's silence on our interpretation of the gravity prerequisite, Alabama contends that the Court's decision neither necessitates nor compels any change in our construction of the “significant and substantial” language in sec. 104(c).

It is, of course, quite true that the Court's holding was narrow and pertained exclusively to violations cited in withdrawal orders issued under sec. 104(c)(1) of the Act. And while the narrowness of the holding is arguably a basis for distinguishing the case at hand, we think that such a technical reading of the Court's decision would at best be disingenuous. In our judgment, the Court's opinion has broader implications and does indeed compel a change of position on our part.

Both in *Eastern* and *Zeigler*, *supra*, we held that there was an implied gravity requirement for the issuance of sec. 104(c) withdrawal orders in order to place them rationally in the overall scheme of enforcement. We thought that that scheme called for application of en-

forcement actions of an increasingly imposing nature as a function of the *seriousness* of the misconduct in question. See *Zeigler Coal Company v. Kleppe*, 536 F. 2d 398 (D.C. Cir. 1976), *aff'g Zeigler Coal Company*, 4 IBMA 30, 82 I.D. 36, 1974-1975 OSHD par. 19,237 (1975).<sup>3</sup>

In reversing our decision in *UMWA v. Kleppe*, *supra*, the Court of Appeals relied principally on the literal wording of sec. 104(c) as buttressed by the legislative history. The Court neither commented on our contextural analysis nor sought to relate sec. 104(c) to the other enforcement provisions of sec. 104 as a means of illuminating the underlying intent and purposes of that particular provision.

By holding that a sec. 104(c) (1) withdrawal order may be validly issued without regard for any gravity criterion, the Court impliedly rejected our view that the only rational interpretation of sec. 104(c) is one which is in harmony with an overall construction of sec. 104 calling for more severe enforcement actions as a function of the increasing gravity of the transgressions of an operator. Moreover, in

relying upon the literal wording which results in wider deterrence of noncompliance with the mandatory standards and upon the legislative history to support its holding, the Court has set an example for interpreting sec. 104(c) which apparently excludes almost any other consideration.

The reason that the appellate court's holding and supporting reasoning is important here is quite simply that our construction of the "significant and substantial" language in sec. 104(c) (1) was the product of virtually the same reasoning that the Court rejected in reversing *Zeigler*. When we construed that language to mean "probable risk of serious bodily harm or death," we disregarded the plain semantical meaning of that phrase in favor of a more restrictive reading of the statutory words which fitted in with our overall concept of the enforcement scheme.<sup>4</sup> The emphasis of the D.C. Circuit on literalism which promotes wider operator liability and its rejection of our holding and the underlying reasoning in support thereof have undermined the "probable risk" test completely. An honest reading of the Court's opinion thus compels us to overrule *Eastern Associated Coal Corp.*, *supra*, and *Zeigler Coal Company*, *supra*, insofar as they validate the "probable risk" test.

<sup>3</sup> In this later case, also involving *Zeigler*, decided Apr. 22, 1976, the Court of Appeals affirmed a decision by the Board sustaining a section 104(b) withdrawal order predicated on alleged noncompliance with a ventilation plan. Among other things, the Court made the following statement with respect to the enforcement scheme: " \* \* \* The statute establishes three kinds of enforcement remedies—withdrawals, civil fine and criminal penalties—and sets up procedures governing the application of each. It provides for remedial actions of increasing severity, as the nature of the conduct being redressed grows more serious. \* \* \* 536 F. 2d at 403.

<sup>4</sup> In construing the "significant and substantial" language in sec. 104(c) (1), we said in *Zeigler Coal Company*, *supra*, that a "probable risk" test was necessary because otherwise that language would be rendered nugatory. 4 IBMA at 156. We were, of course, thinking in strictly functional terms.

There remains, however, the question of how the "significant and substantial" language should now be interpreted.

The United Mine Workers of America (UMWA), the Mining Enforcement and Safety Administration (MESA), and the Council for the Southern Mountains, Inc. (the Council), participating as an *amicus curiae*, although expressing themselves somewhat differently, are largely in agreement on the proper answer to this question. They think that the Congress meant to preclude issuance of sec. 104(c)(1) notices for violations which, in the words of the Council, do not pose a " \* \* \* reasonable possibility of danger to the health and safety of the miners." This suggested interpretation, although not sufficiently precise, is fairly close to the mark in our opinion.<sup>5</sup>

Sec. 104(c)(1), it should be recalled, mandates the issuance of a notice when an inspector finds that " \* \* \* a violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard \* \* \*." Our position now is that these words, when applied with due regard to their literal meanings, appear to bar issuance of notices under sec. 104(c)(1) in two categories of violations, namely, violations posing no risk of injury at all, that is to say, purely technical violations, and violations pos-

ing a source of *any* injury which has only a remote or speculative chance of coming to fruition. A corollary of this proposition is that a notice of violation may be issued under sec. 104(c)(1) without regard for the seriousness or gravity of the injury likely to result from the hazard posed by the violation, that is, an inspector need not find a risk of serious bodily harm, let alone of death.

The inspector's judgment as to whether a given violation is " \* \* \* of such nature as could significantly substantially contribute to the cause and effect of a mine safety or health hazard \* \* \*" must be reasonable. The reasonableness of such a judgment is dependent upon the peculiar facts and circumstances of each case, and it is up to an Administrative Law Judge initially, and the Board ultimately, to determine whether an inspector was reasonable in so finding in any given case.

We recognize that our interpretation today means that federal coal mine inspectors have a very wide area of discretion to issue sec. 104(c) notices with all the attendant liability to summary withdrawal orders which necessarily follows upon even the most trivial of violations after issuance of such a notice. However, when the present controversy is viewed in the reflected light cast by the D.C. Circuit on sec. 104(c) in *UMWA v. Kleppe*, *supra*, no other conclusion can sensibly be drawn.

The UMWA and MESA, joined by the *amicus* Council, have asked

<sup>5</sup> None of the litigants in this case has cited any legislative history directly in point on the meaning of the "significant and substantial" language in sec. 104(c)(1).

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that we set aside our original decision as well as the decision below, and that we remand for new findings on the question of whether the violation cited in Notice 3 CLM, Oct. 23, 1974, was “\* \* \* of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard.” We agree that that is the proper course of action in view of our revised interpretation of the above-quoted phrase.

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Board’s original decision in the above-captioned appeal and the initial decision below in Docket Nos. BARB 75-608 and BARB 75-609 ARE SET ASIDE.

IT IS FURTHER ORDERED that this case BE REMANDED to the Hearings Division for further proceedings not inconsistent with the foregoing opinion.

DAVID DOANE,

*Chief Administrative Judge.*

I CONCUR:

DAVID TORBETT,

*Alternate Administrative Judge.*

**ADMINISTRATIVE JUDGE SCHELLENBERG, CONCURRING IN THE RESULT:**

I am not convinced that the limited holding of the Court in

*UMWA v. Kleppe, supra*, compels our action today nor that such action is administratively prudent. The only issue before that Court was “whether Congress intended to apply this gravity criterion to the second sentence and therefore, to require another prerequisite to be met before a withdrawal order may issue pursuant to sec. 814(c)(1).”

However, I concur in result since I am in complete agreement that the Board’s interpretation, in *Eastern Associated Coal Corp., supra*, of the sec. 104(c) sanctions was in error.

Insofar as the decision itself is concerned I would have preferred to adopt as a guideline, for the interpretation and enforcement of sec. 104(c)(1), the suggestion of the *Council of Southern Mountains, Inc.*, that the pertinent phrase be interpreted to mean, “a reasonable risk of danger to the safety or health of the miners.” I believe this interpretation cuts through the semantic morass and more clearly and precisely expresses the statutory intent.

HOWARD J.

SCELLENBERG, JR.,

*Administrative Judge.*

**MARY E. COAL COMPANY, INC.**

7 IBMA 98

Decided November 24, 1976

Appeal by the Mining Enforcement and Safety Administration from that part of a decision by Administrative

Law Judge Charles C. Moore, Jr., vacating one notice of violation in a civil penalty proceeding (Docket Nos. NORT 74-761-P and 74-791-P) brought pursuant to sec. 109(a)(1) of the Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. § 219 (a)(1) (1970)).

Reversed.

### 1. Federal Coal Mine Health and Safety Act of 1969: Evidence: Relevancy

Where an Administrative Law Judge refuses to accord probative value to certain admitted evidence on the ground that such evidence is irrelevant, he errs when his conclusion of irrelevancy is based upon mere presumption and surmise without evidentiary foundation.

### 2. Federal Coal Mine Health and Safety Act of 1969: Incombustible Dust Program: Evidence: Sufficiency

The unchallenged testimony of an inspector that he followed instructions [departmental directives] pertaining to the gathering and packaging of dust samples, together with a laboratory analysis of dust samples, unchallenged by the operator, showing insufficient incombustible content, constitutes sufficient evidence to establish a violation of 30 CFR 75.403.

## INTERIOR BOARD OF MINE OPERATIONS APPEALS

At issue in this appeal is Notice No. 1 SMC, Mar. 6, 1973, cited in Mary E. Coal Company's (Mary) No. 2 Mine in Buchanan County, Virginia, pursuant to the Federal Coal Mine Health and Safety Act of 1969 Act).<sup>1</sup> The notice alleges the following condition or practice in violation of 30 CFR 75.403.<sup>2</sup>

Rock dust applications were clearly inadequate in the No. 1 main tractor haulage roadway 002 section beginning at survey station No. 4504 and extending outby for a distance of approximately 200 feet.

An evidentiary hearing was held on Oct. 29, 1975, in Big Stone Gap, Virginia. The inspector who issued the notice testified that he gathered four dust samples, packaged them according to instructions, in airtight, moisture proof containers, and sent them to the laboratory at Mt. Hope, West Virginia (Tr. 12, 13). About two or three weeks later, the inspector received from Mt. Hope a report of analyses of the dust samples submitted. The report (Gov't. Exh. No. 2) listed the four dust samples, the location of their respective sources in the mine, and

<sup>1</sup> 30 U.S.C. §§ 801-960 (1970).

<sup>2</sup> 30 CFR 75.403 provides in pertinent part:

"Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 65 per centum, but the incombustible content in return aircourses shall be not less than 80 per centum." \* \* \*

**APPEARANCES:** Thomas A. Moscolino, Esq., Assistant Solicitor, Frederic K. Rosenberg, Trial Attorney, for appellant, Mining Enforcement and Safety Administration.

*OPINION BY CHIEF ADMINISTRATIVE JUDGE DOANE*

the percent incombustibility of each as follows:

	Percent
20 feet outby survey No. 4504 No. 5 entry -----	61.7
30 feet inby survey No. 3808 No. 5 entry -----	34
40 feet outby survey No. 3808 No. 4 entry -----	40
100 feet outby survey No. 3808 No. 4 entry -----	34

In his decision dated Dec. 22, 1975, the Administrative Law Judge (Judge), considered only the first of the above samples to be "relevant to the violation charged" because only its sampling location (survey point No. 4504 No. 5 entry) was set forth in the notice of violation. While he conceded the verity of the laboratory analysis with respect to this sample, the Judge was not satisfied that the inspector, in gathering and packaging the sample, had taken adequate precautions to retain its moisture content.<sup>3</sup> He therefore vacated the notice of violation.

On appeal, MESA contends that the Judge erred in failing to consider all four samples and in disregarding the inspector's unchallenged assurances that the moisture content of the samples was adequately preserved.

Mary E. Coal Company, Inc., has not participated in this appeal.

### *Issues Presented on Appeal*

1. Whether the Judge erroneously determined that only one of

the four dust samples used as the basis for issuing the notice of violation should be considered as "relevant to the charge of violation" because of the failure to properly describe in the notice the location from which the other three samples were taken.

2. Whether the Judge erroneously concluded that MESA failed to prove the alleged violation on the ground that the MESA inspector had not taken "sufficient steps to retain the moisture content" of the subject samples.

### *Discussion*

For the reasons set forth below, we hold that the Administrative Law Judge did err with respect to both issues raised on appeal. Therefore, his decision vacating the subject notice of violation must be reversed and an appropriate penalty assessed against the operator.

#### A.

[1] The Judge, in referring to Government Exhibit No. 2, stated:

\* \* \* The Exhibit in question shows the results of four different floor samples but only one of these samples was taken at a location described by reference to Survey Marker No. 4504, which is the survey point noted in the notice of violation. Presumably, therefore, it is only that sample, which shows 61.7 percent incombustible, that is relevant to the violation charged. \* \* \* [Italics supplied.] (Dec. p. 2.)

Based upon our analysis of the record, we are of the view that the

<sup>3</sup> 30 CFR 75.403-1 provides that moisture contained in such a sample shall be considered as part of its incombustible content.

Judge mistakenly concluded that the exhibit (report of laboratory analyses) proved facts not within the scope of the charge alleged in the notice merely because the exhibit, with respect to the three samples rejected for consideration, utilized survey station No. 3808 as a point of reference instead of survey station No. 4504 mentioned in the notice.

As pointed out in MESA's brief, the inspector testified that entries 4 and 5 were parallel entries (Tr. 11), and there is no showing that any of the measurements recited in the exhibit were not within 200 feet outby survey station No. 4504 as indicated in the notice. The Judge merely presumed and surmised without any evidentiary basis therefor that the three rejected samples were not taken from the area within 200 feet outby survey station No. 4504. Furthermore, only the Judge appeared to be concerned with the relevance of the samples correlated with survey station No. 3808. Neither the operator nor its counsel raised any question of their relevance by way of pleading or by way of objection at the hearing.

Under these circumstances, we agree with MESA that the Judge erred in not considering the laboratory report with respect to all four samples mentioned in Government Exhibit No. 2.

## B.

[2] The second issue relating to the retention of moisture content was initiated by the Judge, who,

after noting that the regulations require that the moisture content of a sample be considered as a noncombustible portion of that sample, stated the following on page 2 of his decision:

Placing the samples in cellophane bags and tying them with strings does not satisfy me that sufficient steps to retain the moisture content have been taken.

The challenge regarding retention of moisture content asserted and sustained by the Judge in his decision constituted an affirmative defense which was neither alleged by the operator nor supported by the evidence. In our opinion, the Judge not only erred by asserting the affirmative defense *sua sponte* but also by concluding that the evidence of record proved it.

The answer filed by the operator in response to the MESA petition for assessment of civil penalty consisted of a denial that the violations occurred as alleged, a denial that the operator was negligent, a denial that any of the alleged violations were serious, an allegation that the operator demonstrated good faith in achieving rapid compliance after the alleged condition and/or practices were brought to its attention, a request for hearing, and a request for proof of the alleged violations. At the hearing, likewise, there was no attempt made by the operator to assert or establish that the inspector had failed to retain the moisture content of the samples taken.

The evidence pertaining to the occurrence of the subject alleged violation consisted entirely of the

unchallenged testimony of the inspector and the report of the laboratory analyses of the samples taken at the mine by the inspector (Gov't Exhibit No. 2). At the hearing, Judge Moore asked the inspector in effect how he kept the samples after they were collected and before sending them to the laboratory. After that question the following colloquy took place, according to pages 12 and 13 of the transcript:

A. I keep them in containers especially for that—cardboard containers.

Q. Is it a moisture proof container?

A. They are in cellophane bags that were used especially for that. These bags would be moisture proof.

Q. Are they sealed?

A. Well, they're tied. There are tags with strings and we tie them.

Q. Were there any provisions to keep whatever moisture might be in this dust from evaporating?

A. Yes, sir. I think so.

Q. By tying them airtight?

A. That's right.

The only evidence adduced by the operator on this subject notice of violation was the testimony of Mr. Hobbs and his cross-examination of the inspector which was confined to establishing only that the operator's foreman was not negligent and that the violation had been abated rapidly (Tr. 38-41).<sup>4</sup>

The Judge concluded his decision with respect to the subject notice of

violation with the following statement:

MESA has thus failed to carry its burden of proof with respect to this alleged violation and the Notice of Violation is accordingly vacated.

The Judge did not articulate what he meant by his use of the term "burden of proof." If he meant that MESA had failed to make out a "prima facie case," he was in error, because the challenge of failure to retain moisture content is in the nature of an affirmative defense normally to be proved after a prima facie case has been established and is not an element of proof of a prima facie case. On the other hand, if he meant that MESA had failed to "preponderate," he is also in error because the only evidence adduced on the point in question was on the side of MESA. It is clear that the Board must hold that the violation was proved.

Having concluded that the alleged violation occurred, it remains to be determined what amount should be assessed as a civil penalty.<sup>5</sup> We adopt herein the findings of the Judge with respect to the criteria in sec. 109(a)(1) of the Act (30 U.S.C. § 819(a)(1) (1970)). The operator's mine is small and maximum penalties would have a deleterious effect on its ability to continue in business. There is no significant history of prior violations and abatement of this viola-

<sup>4</sup> Mr. Hobbs was not precisely identified in the record, but was apparently an officer of the Mary E. Coal Company, Inc., representing it as counsel and also serving as its only witness.

<sup>5</sup> The Board assumes authority for making an appropriate assessment of penalty on the basis of the provisions of sec. 109(a)(1) of the Act, 30 U.S.C. § 819(a)(1) (1970), and 43 CFR 4.605.

tion was prompt and in good faith. No significant evidence of negligence or gravity was adduced. Accordingly, a penalty of \$50 will be assessed.

### ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)). IT IS HEREBY ORDERED: that the decision of the Administrative Law Judge IS REVERSED; that the order of the Administrative Law Judge vacating Notice of Violation 1 SMC, Mar. 6, 1973, IS SET ASIDE; and that Mary E. Coal Company, Inc., pay a penalty of \$50 for the violation charged in said notice within 30 days from the date of this decision.

DAVID DOANE,

*Chief Administrative Judge.*

WE CONCUR:

HOWARD J. SCHELLENBERG, JR.,  
*Administrative Judge.*

LOUIS E. STRIEGEL,  
*Member of the Board.*

### UNITED STATES STEEL CORPORATION

7 IBMA 109

Decided November 29, 1976

Appeal by Mining Enforcement and Safety Administration from a decision by Administrative Law Judge Frank-

lin P. Michels, dated Oct. 10, 1975, in Docket No. HOPE 75-712, in which he granted the Application for Review filed by United States Steel Corporation and vacated a sec. 104(b) Order of Withdrawal pursuant to sec. 105 of the Federal Coal Mine Health and Safety Act of 1969.

### Affirmed.

#### 1. Federal Coal Mine Health and Safety Act of 1969: Withdrawal Orders: Failure to Abate

Where an inspector finds that a violation has not been abated within the time fixed for abatement, his authority under sec. 104(b) of the Act to issue either an extension of time or an order of withdrawal must be exercised reasonably based on the facts confronting him at the time. 30 U.S.C. § 814(b) (1970).

#### 2. Federal Coal Mine Health and Safety Act of 1969: Notices of Violation: Abatement

Respirable dust samples required to be taken pursuant to 30 CFR 70.250 may be taken during any shift so long as the miner whose work atmosphere is being sampled is employed in his usual occupation.

APPEARANCES: Thomas A. Mascolino, Esq., Assistant Solicitor, and David L. Baskin, Esq., Trial Attorney, for appellant, Mining Enforcement and Safety Administration; Billy M. Tennant, Esq., for appellee, United States Steel Corporation.

OPINION BY CHIEF ADMINISTRATIVE JUDGE DOANE

November 29, 1976

## INTERIOR BOARD OF MINE OPERATIONS APPEALS

### *Factual and Procedural Background*

On Nov. 6, 1974, a Mining Enforcement and Safety Administration (MESA) inspector served by mail on the United States Steel Corporation (U.S. Steel) a sec. 104(b) notice of violation which alleged that U.S. Steel had violated 30 CFR 70.250<sup>1</sup> by failing to take respirable dust samples with respect to eight individuals as required by the above regulation. On Dec. 4, 1974, a notice extending the time for abatement fixed in the November notice was served by mail upon U.S. Steel, and the reason for extension was stated as follows: "[r]espirable dust samples were collected and/or a valid reason was submitted for not collecting samples for 4 of 8 employees; therefore, additional time

was granted." The notice required the alleged violation to be abated by Jan. 2, 1975. On Feb. 13, 1975, a sec. 104(b) Order of Withdrawal was personally issued to U.S. Steel when a MESA inspector determined that respirable dust samples for two of the eight original individuals had not yet been submitted and that the time for abatement of the violation should not be extended. Prior to issuing the Order, the inspector examined U.S. Steel's records to determine whether samples had been taken since Dec. 4, 1974 with respect to these two men. This examination revealed that such samples had not been taken and also that no copies of the Nov. 6 and Dec. 4 notices were present at the mine office.

When he issued the Order, the inspector determined that the "area affected by the violation" was the entire section where each of the two individuals worked. Accordingly, he withdrew all personnel from two sections of the mine. One of the individuals reported for work at 4 p.m. and the other at 12 midnight at which times the Order was modified to permit the resumption of mining in the section where each worked so that the sample of his work atmosphere could be taken. The inspector denied a U.S. Steel request to have the midnight shift miner report for work at 4 p.m., a shift early, in order for the operator to abate the violation as quickly as possible. After the taking of these samples, the Order was terminated on Mar. 28, 1975.

<sup>1</sup> 30 CFR 70.250 provides:

"(a) Except as provided in paragraphs (b) and (c) of this section, one sample of respirable dust shall be taken from the mine atmosphere to which each individual miner is exposed at least once every 180 days, except those miners already sampled during such 180-day period in sampling cycles conducted under the provisions of §§ 70.210, 70.220, and 70.230.

"(b) One sample of respirable dust shall be taken from the mine atmosphere to which each individual miner assigned to a working section is exposed at least once every 120 days, except those miners already sampled during such 120-day period in sampling cycles conducted under the provisions of §§ 70.210, 70.220, and 70.230 of this part.

\* \* \* \* \*

"(d) The samples required under the provisions of this section shall be taken during any shift where the miner is employed in his usual occupation \* \* \*"

U.S. Steel filed a timely Application for Review of the Order alleging that the inspector had acted arbitrarily, unreasonably, and capriciously in his determination: (1) that the time for abatement should not be extended; (2) that the area affected by the violation was two entire sections; and (3) that the 12 p.m. miner could not work an earlier shift in order for the operator to abate the violation more quickly. MESA filed an answer denying U.S. Steel's allegations.

A hearing was held before the Administrative Law Judge (Judge) on May 29, 1975. In his decision, the Judge found that although return receipts indicated that U.S. Steel had received the initial Notice, neither the Notice nor a subsequently issued extension could be found in U.S. Steel's files on the morning of Feb. 13. As a result, the Judge found that the failure to take the required samples was the result of poor bookkeeping. He also found that: (1) U.S. Steel had an excellent record of being cooperative with MESA; (2) that the instant mine had a good history of maintaining a respirable dust concentration of less than 2 milligrams in that it had been issued only four respirable dust violations in the period 1971-1973; and (3) the violation did not create any health or safety hazards. The Judge based the last of these findings on testimony of MESA witnesses which indicated that: (1) the required sam-

ples were not used to calculate the respirable dust levels for purposes of determining compliance with the respirable dust standards; (2) the sections where these two individuals worked were in compliance with the 2-milligram standard at the time; (3) if the samples were to indicate a respirable dust level exceeding the mandatory standard, neither would a notice of violation be issued nor would any corrective action be required; and (4) the intent of 30 CFR 70.250 was apparently to provide HEW with some correlating information to be used in conjunction with X-rays in pneumoconiosis cases.

The Judge concluded, as a matter of law, that the inspector's authority under sec. 104(b) of the Act in determining whether the time allowed for abatement should be extended or an order of withdrawal issued carries the implication that it will be exercised reasonably, not arbitrarily or capriciously. Based upon the foregoing findings of fact, and conclusion of law, the Judge concluded that the inspector had acted unreasonably in failing to extend the time allowed for abatement and in issuing the subject Order, and that the Order was, therefore, improperly issued.

MESA filed a timely Notice of Appeal and in its supporting brief contended that the Order was reasonably and properly issued. Although the Judge did not rule on the issue, MESA also contended that the inspector properly refused

November 29, 1976

U.S. Steel's request to have the mid-night shift miner work one shift earlier because U.S. Steel did not inform the inspector that the individual would be sampled while working at his usual occupation in his usual section. U.S. Steel filed as its brief in opposition the brief it had filed before the Judge.

### *Issues Presented*

A. Whether the Judge erred in concluding that the inspector had acted unreasonably in issuing the instant Order.

B. Whether the inspector acted unreasonably in denying U.S. Steel's request to call in the mid-night shift miner to work an earlier shift in order for the operator to abate the violation more quickly.

### *Discussion*

#### A.

In its brief on appeal, MESA submits that a sec. 104(b) order of withdrawal "is properly issued where a reasonable man, given an inspector's qualifications, would have acted in the same manner." The Judge, in his opinion, characterizes the inspector's authority in determining whether a notice of extension of time or a sec. 104(b) order should issue as "carrying the implication that it will be reasonably exercised."

[1] In *Old Ben Coal Company*, 6 IBMA 294, 83 I.D. 335, 1976-1977 OSHD par. 21,094 (1976), the

Board enunciated its test concerning the validity of a sec. 104(b) order when it held that the inspector's determination to issue a sec. 104(b) order must be based on "the facts confronting the inspector at the time he issued the subject withdrawal order regarding whether an *additional* abatement period should be allowed." In the instant case, the issuing inspector was aware of bookkeeping problems at the mine office on the morning of Feb. 13, and he was also aware of U.S. Steel's record with respect to being generally cooperative with MESA and in maintaining compliance with the respirable dust standard. Inasmuch as the subject violation presented no health hazard for the reasons cited by the Judge and in light of the above facts, the Board is of the opinion, as was the Judge, that the MESA inspector acted unreasonably in failing to extend the time for abatement and in issuing the subject order.

#### B.

[2] With respect to the issue of whether the inspector acted properly in denying U.S. Steel's request for having the midnight shift individual work the 4 p.m. shift, the Board is of the opinion that the inspector erred. The inspector based his denial on the belief that such action would constitute a prohibited temporary transfer because U.S. Steel did not specifically inform him that the individual

would be working in his usual occupation. The provisions of 30 CFR 70.250(d) specifically permit the taking of the required sample during *any* shift in which the miner is employed in his usual occupation. That the inspector felt that he needed to be specifically informed that the individual would be working in his usual occupation infers that he believed U.S. Steel would deliberately violate the law by employing the miner in a different occupation. In the first place, all the inspector needed to do was to inquire from the operator whether the subject miner would be employed at his usual occupation during the earlier shift. Secondly, not having made the inquiry, it appears to us that the inspector had no more reason to assume that the miner would not be employed in his usual occupation than to assume that he would be. We are of the opinion, contrary to MESA's posi-

tion, that, under the circumstances, this denial by the inspector of U.S. Steel's request was arbitrary and, therefore, unreasonable.

### ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision of the Judge in the above-captioned case IS AFFIRMED.

DAVID DOANE,

*Chief Administrative Judge.*

WE CONCUR:

HOWARD J. SCHELLENBERG, JR.,

*Administrative Judge.*

LOUIS E. STRIEGEL,

*Member of the Board.*

**AUTHORITY OF BONNEVILLE  
POWER ADMINISTRATOR TO  
PARTICIPATE IN FUNDING OF  
PROGRAM TO HELP RESTORE  
THE COLUMBIA RIVER ANAD-  
ROMOUS FISHERY\***

**Bonneville Power Administration:  
Generally**

The Bonneville Power Administrator has authority to undertake or fund a study or project to help restore the Columbia River anadromous fishery if he finds that such a study or project is necessary or appropriate to carry out his power marketing responsibilities under the Bonneville Project Act, 16 U.S.C. §§ 832-832i (1970), and other related statutes.

M-36885

*November 22, 1976*

**To:** Bonneville Power Administrator.

**FROM:** Regional Solicitor, Portland.

**SUBJECT:** Authority of Bonneville Power Administration to participate in funding of program to help restore the Columbia River anadromous fishery.

Bonneville Power Administration (BPA) and four Columbia River Indian tribes have entered into a Memorandum of Understanding in which each party pledges to take part in a program intended to help restore the Columbia River anadromous fishery.\*\* That fishery

has been greatly diminished in recent years as a result of a number of factors, a major one of which has been the construction and operation of the multipurpose dam and reservoir projects of the Federal Columbia River Power System (FCRPS). BPA is the power marketing agency for that System and pursuant to statutory and Secretarial direction and Memoranda of Understanding with the Corps of Engineers (Contract No. 14-03-19250) and the Bureau of Reclamation (Contract No. IBP-4512) determines the power facilities to be installed by those agencies at those projects and the schedules of power operations of those facilities. However, operation of the projects for power production is subject to certain constraints necessary to protect or fulfill other purposes, including fisheries.<sup>1</sup>

treaty tribes and the Pacific Northwest Regional Commission, consisting of the governors of Oregon, Washington and Idaho and a Federal Cochairman. The Commission is charged by federal statute (79 Stat. 574, 42 U.S.C. § 3183 (1970)) with responsibility for economic development and resource program coordination in the Pacific Northwest.

<sup>1</sup> See also The Pacific Northwest Coordination Agreement (BPA Contract No. 14-03-48221, Sept. 1964) executed by fourteen Pacific Northwest generating utilities and the United States. That agreement notes in a Recital that "coordination for the production of power must take into consideration nonpower uses for water resources and must be achieved as a part of the comprehensive development and management of water resources for maximum sustained benefit for the public good."

Sec. 15 of that agreement provides: "Nothing in this agreement shall require a party to operate a Project in a manner inconsistent with its requirements for nonpower uses or functions, \* \* \*."

\*Not in Chronological Order.

\*\*On Nov. 29, 1976, that memorandum was replaced by a similar one among BPA, the four

*OPINION BY REGIONAL  
SOLICITOR RATCLIFFE  
OFFICE OF THE SOLICITOR*

The four tribes have treaty-secured fishing rights on the Columbia River system which are affected by the operation of the Federal Columbia River Power System. 12 Stat. 945; 12 Stat. 951; 12 Stat. 957; 12 Stat. 963; *Sohappy v. Smith* (U.S. v. Oregon), 302 F. Supp. 899 (D. Or. 1969); *Confederated Tribes of the Umatilla Indian Reservation, et al. v. Callaway, Hodel, et al.*, Civil No. 72-211, D. Or. Aug. 17, 1973.

*BACKGROUND OF  
MEMORANDUM OF  
UNDERSTANDING*

*A. Relationship of Federal Power Operations to Columbia River Fish Runs*

The Columbia River and its tributaries are the major hydroelectric power source of the North American continent. This river system has also long been recognized as one of the world's greatest producers of anadromous salmon and steelhead. This fishery resource has played a major role in the cultural and economic development of the region.<sup>2</sup> From the very onset

of federal power or multipurpose development on the river Congress has recognized the importance of incorporating into such development measures and expenditures for protection of the anadromous fish resources. And it has recognized that the cost of such protection should be borne largely by those who benefit from the project construction and operation, including power rate-payers. This recognition has extended from the provision for fishways in the Bonneville Dam, the first of the river's federal hydroelectric projects (49 Stat. 1028; see also Sen. Res. 113, Apr. 9, 1937, and Sen. Doc. No. 87, 75th Cong. 1st Sess., pp. 27-40), to the recent authorization of a Corps of Engineers 58.4 million dollar Snake River Fish and Wildlife Compensation Plan in the Water Resource Development Act of 1976 (P.L. 94-587).

spawned in the tributaries, headwaters and mainstem, migrate to the Pacific Ocean where they spend the bulk of their adult life, return generally to the river or stream of their origin, spawn, and, in case of salmon, die. From aboriginal times these salmon and steelhead have been a highly prized source of food. They are also a major recreational attraction to sports fishermen.

From the earliest known times, up to and beyond the time of the treaties, the Indians comprising each of the intervenor tribes were primarily a fishing, hunting and gathering people dependent almost entirely upon the natural animal and vegetative resources of the region for their subsistence and culture." \* \* \*

(pp. 905-906)  
See also "The History and Development of the Fisheries of the Columbia River" by Joseph A. Craig and Robert L. Hacker, Bureau of Fisheries, U.S. Department of the Interior, Bulletin No. 32, 184 pp. (1938) (published 1940).

<sup>2</sup> As noted by the federal court in *Sohappy v. Smith*, *supra*:

"The Columbia River has long been one of the world's major producers of salmonid fish. Several species of salmon and steelhead trout inhabit the river and its tributaries. They are

The cost of this mitigation and compensation effort has been allocated to the purposes for which the dam and reservoir projects are constructed and operated.<sup>3</sup> To date approximately \$300 million of capital investment for fisheries-related facilities or programs associated with projects of the Federal Columbia River Power System has been assigned for repayment from power revenues. At the present time the annual costs to be returned from power revenues to cover operation and maintenance and interest and amortization on the capital investment of these fisheries facilities and measures amounts to some \$19.5 million.

Much data has been compiled and numerous reports written by many agencies to analyze the recent trend and current status of the Columbia River salmon and steelhead runs and the causes of their

decline.<sup>4</sup> While the data in these reports and the conclusions drawn from them differ in a number of respects—some very markedly—two indisputable conclusions are relevant to our consideration here. The salmonid runs, especially those destined for the upper Colum-

<sup>4</sup> See, e.g., in addition to Sen. Doc. No. 87, *supra*:

1. Annual Fish Passage Report, Columbia River Projects, by North Pacific Div. Corps of Engineers.
2. Columbia River Fish Runs and Fisheries (updated annually) by Oregon Department of Fish and Wildlife (formerly by Oregon Fish Commission) and Washington Department of Fisheries.
3. The Sport and Commercial Harvest of Recent Columbia River Salmon and Steelhead Runs (1973) by the Oregon State Game Commission.
4. Status Reports on Anadromous Fish Runs of the Columbia River by Fish and Wildlife Committee of the Pacific Northwest River Basins Commission.
5. Columbia Basin Salmon and Steelhead Analysis (1976) funded by the Pacific Northwest Regional Commission.
6. The Snake River Salmon & Steelhead Crisis, Its Relation to Dams and the National Energy Crisis (1975) by Northwest Fisheries Center, National Marine Fisheries Service.
7. Snake River Runs of Salmon and Steelhead Trout: Trends in Abundance of Adults and Downstream Survival of Juveniles by Howard L. Raymond, Northwest Fisheries Center, National Marine Fisheries Center.
8. Special Report, Lower Snake River Fish and Wildlife Compensation Plan, Walla Walla District, U.S. Army Corps of Engineers, 1975.
9. Annual Progress Reports Fisheries-Engineering Research Program by North Pacific Division, U.S. Army Corps of Engineers.
10. In Sea and River—Research at the Bureau of Commercial Fisheries Biological Laboratory, Seattle, Washington, 1966-68, Circular No. 329, Dept. of the Interior 1969.
11. The Salmon—Their Fight for Survival by Anthony Netboy, pp. 263-310 and Appendix Table 6 (1974).

<sup>3</sup> The construction agencies (the Corps of Engineers and Bureau of Reclamation) prepare plans and specifications and benefit-cost estimates for proposed projects. The cost estimates include separate listings for serving each of the project purposes and proposals for recovery of the portions of these costs which under law must be returned to the Government. Depending upon the applicable project authorizing legislation, costs are assigned for return in accordance with statutory law or administrative guidelines. Virtually all of the costs of fisheries-related facilities are included as joint costs and allocated to the purposes served. See Schedule A, pp. 32-33, 1975 BPA Annual Report. Final allocations are made by the constructing agency or in certain cases by the Federal Power Commission. All capital investment and operation and maintenance costs allocated to power must be recovered from power revenues.

bia and Snake River Basins, have shown perilous declines since the first dams went into operation.<sup>5</sup> And construction and operation of the Federal Columbia River Power System has been a major cause of these declines. One-half of the natural spawning habitat waters of the Columbia River Basin has either been flooded or blocked by dams (most of them federal) and many of the rest have suffered severe degradation.<sup>6</sup> Large numbers of both juvenile downstream migrants and returning adults have perished attempting to pass over or through the dams.<sup>7</sup> To some extent the declines in run size have been mitigated by greatly increased artificial propagation, by structural and operational modifications of the dam and reservoir projects, by improvement or opening up of substitute spawning habitat, and by other measures.

But it is apparent that, although Congress and the public have consistently recognized the heavy adverse effect of the dam and reservoir projects on the Columbia River fishery resource and have con-

tinuously expressed a legislative and public policy of restoring and maintaining that resource, the efforts to do so to date have not been adequate. This has caused increasing opposition to fuller and more effective utilization of the river's power potential and of the facilities that have been installed or authorized for power production. It has also resulted in legal challenges to certain existing or proposed power operations, particularly those that threaten to unreasonably impair federal treaty or other trust obligations to Indian tribes having vested fishing rights on the Columbia River System.

#### *B. Indian Treaty Fishing Rights*

*Confederated Tribes v. Callaway, Hodel, et al., supra*, was a case against certain officials of the Corps of Engineers and the Bonneville Power Administrator challenging the proposals to make adjustments in the projects and operations of the Federal Columbia River Power System for power peaking purposes. The plaintiffs alleged that such operations would unlawfully impair Indian treaty fishing rights. In the Final Judgment in that case the U.S. District Court made the following Findings of Fact:

12. Statements and affidavits by several fishery experts, including persons from the Federal and state agencies charged with fish management have been introduced by the Plaintiffs in this action which indicate substantial concern by those experts and their agencies with the effect of Defendants' peaking proposal on the upstream and downstream

<sup>5</sup> According to one report prepared in connection with the authorization of Bonneville Dam, the commercial landings of Columbia River salmon, exclusive of the ocean troll fishery, averaged around 29,000,000 lbs. per year for the decade preceding the construction of that dam. (Sen. Doc. No. 87, *supra*, p. 12.) From 1971-1975 these landings dropped to an average of around 8,514,000. (Report on "Fish Runs" by Kirk Beiningen, Oregon Dept. of Fish and Wildlife, contained in "Investigative Reports of Columbia River Fisheries Project" prepared for Pacific Northwest Regional Commission, July 1976.)

<sup>6</sup> Columbia Basin Salmon and Steelhead Analysis. (Pacific Northwest Regional Commission, 1976), p. 3.

<sup>7</sup> *Ibid.*, pp. 6-7.

migration of salmonid fish and on the future supply of such fish. Defendants have introduced reports and affidavits of a fishery expert that the Defendants' peaking proposal need not have any substantial adverse effect on the migration and future supply of salmonid fish. The Final Environmental Impact Statement, Modification for Peaking, filed June 16, 1972. Defendants' Exhibit No. 9, includes statements of agencies and interested persons made on the effect of that plan on the fishery. Defendants do not concede that their proposal will materially interfere with fish migration or supply but they do acknowledge that the concern of fisheries experts justifies further research into the effect of the peaking proposal on fish migration, the supply of fish and fishing activities.

13. The Defendants have undertaken or caused to be undertaken, and agree within their authority to continue research and studies to identify and assess impacts of the modifications and operation of the projects upon upstream and downstream fish migration, fish mortality, reproduction, and fishing activities.

14. Pursuant to congressional direction, the Defendants are undertaking a basin-wide review study of project operations and development plans known as the Columbia River and Tributaries Study now scheduled for completion in 1977. This is designed "to provide factual information for management decisions and to insure that the Columbia River water resource system is responsive to the interests and desires of the public." Interim operating criteria are being prepared as a part of this study and are expected to be available by the summer of 1974.

15. A number of these studies on the impact of the proposed operation on the fishery will be completed prior to any operational changes associated with the peaking proposal. However, it is recognized that some of the studies are of a continuing nature and some required in-

formation cannot be obtained without extended prototype operation. The results of such studies may alleviate or satisfy the concerns of the Plaintiffs and the fishery agencies. Conversely, the Defendants may, as a result of these studies, and the interim operating criteria to be obtained under the Columbia River and Tributaries Study, adopt revised operating criteria and supporting procedures from those contained in the July 28, 1971, position paper for periods of substantial upstream and downstream salmonid migration and during authorized fishing seasons.

In its Conclusions of Law in that Final Judgment the U.S. District Court held:

3. The Plaintiff Umatilla Tribe and the individual Plaintiffs as members of the Yakima Tribe have interests in rights secured by treaty and recognized by the Secretary of the Interior to fish at various usual and accustomed stations and places in the Columbia River and its tributaries and to use the in-lieu fishing sites in the Bonneville Pool.

4. The authority for the modification and use of the Bonneville Project and other Federal Projects on the Columbia River for generation of "peak time" electric power as described in Findings of Fact, paragraphs numbered 8, 9 and 10 above does not authorize Defendants to impair or destroy any fishing rights of Plaintiffs secured by Treaty with the Indians.

The Judgment in that case required the defendants to give certain notice to the plaintiffs of any change in the operating limits for the Bonneville. The Dalles or John Day Pools and to provide periodic status reports annually through 1978 for all of defendants' Columbia River and tributary fishery research and studies.

The main thrust of this case was to acknowledge that the operations of the Federal Columbia River Power System do have an impact on Columbia River fisheries and Indian treaty fisheries in particular and that the Government as the operator of that system may have some obligation to either mitigate such adverse effects on the treaty fishery or possibly make compensation for such effects. While the Judgment does not require the Administrator (or the Corps of Engineers) to undertake any specific research or mitigation activity, it does indicate that such research and activity is within the legitimate concern and purview of both the Administrator and the Corps of Engineers.<sup>8</sup> That decision and other federal court decisions construing Indian treaty fishing rights, are, therefore, relevant to a consideration of whether a particular proposed expenditure from the Bonneville Power Administration Fund, which the Administrator includes in his annual budget submitted to Congress pursuant to the Federal Columbia River Transmission System Act (discussed *infra*), is for a "purpose necessary or appropriate to carry out the duties

imposed upon the Administrator pursuant to law."

Among those other decisions are *Sohappy v. Smith* (U.S. v. Oregon), *supra*, and *United States v. Washington*, 384 F. Supp. 312 (1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975); *cert. denied*, 423 U.S. 1086 (1976); *rehearing denied*, 44 L. Wk 3532 (3/22/76). *Sohappy v. Smith*, affirmed and construed the treaty fishing rights of each of the four tribes which are parties to the Memorandum of Understanding with Bonneville, 302 F. Supp. 899 at 905 (1969). In *United States v. Washington*, *supra*, the United States Court of Appeals for the Ninth Circuit stated:

To this day, fishing remains an important aspect of Indian tribal life, providing food, employment, and an ingredient of cultural identity. Indians have adopted modern techniques of sport and commercial fishing. They share the concern of other citizens with preservation of runs of anadromous fish. Some tribes regulate the times and manner of fishing by their members.

520 F.2d 676, 683 (9th Cir. 1975).

The United States (at the request of the Secretary of the Interior) has recently asked the United States District Court to hold that Indian treaty fishing rights such as those which exist on the Columbia River "are entitled to protection from and may not be impaired by actions \* \* \* which significantly and adversely affect fish habitat and the number or quality of fish available to treaty Indians." (United States Supplemental Complaint for Declaratory Judgment filed Nov. 11, 1976,

<sup>8</sup> In a subsequent decision in another case the same judge held:

"For example, I just never heard of any concept that the United States Government can't do something in the world that's going to reduce the wildlife count or the fish count. I just never heard of that concept before. Of course they can." (*Umatilla v. Hoffman*, Civil No. 74-991, Judge Belloni, Tr. p. 36, Nov. 23, 1975.)

However, we do not construe this as relieving an agency from an obligation to take reasonable steps to minimize adverse impacts of its activities on the Indian treaty reserved fishing right. *Of. U.S. pleading in U.S. v. Washington, infra.*

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in *U.S. v. Washington*, No. 9213 W.D. Wash.)

In *Sohappy v. Smith*, *supra*, the federal court recognized that the Indian fishery is "an interest to be recognized [and] a fishery to be promoted" in a fisheries "regulatory and developmental program." 302 F. Supp. at 910. *Accord*, *State v. Tinno*, 497 P. 2d 1386, 1393 (Idaho 1972).

The threat of having BPA's congressionally authorized power operations curtailed or rendered less flexible if means are not found and undertaken to lessen their impact on Indian fisheries is no idle or speculative one.

The Supreme Court of the United States in a case interpreting the Columbia River fishing rights of the Yakima Indian Tribe stated the nature of the Government's obligations under that treaty as follows:

\* \* \* It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the Council and in a spirit which generously recognizes the full obligation of this nation to protect the interest of a dependent people. \* \* \*

*Tulee v. Washington*, 315 U.S. 681, 684 (1942).

This statement was quoted and relied upon by Judge Belloni of the U.S. District Court for Oregon in *Sohappy v. Smith*, *supra*. Similar statements were quoted in *U.S. v. Washington*, *supra*, 384 F. Supp. at 330-331.

And in *U.S. v. Washington*, *supra*, the Court of Appeals said:

\* \* \* The Supreme Court has indicated its extreme reluctance to find congressional abrogation of Indian treaty rights in the absence of explicit statutory language so directing. \* \* \*

520 F. 2d at 689.

Not only is there an absence of any such explicit statutory language for the Columbia River System, but in the case of Bonneville Dam Congress expressly authorized the acquisition of "in lieu sites" for the Indian fishery (50 Stat. 22 *as amended* by 69 Stat. 361), an authorization that would be pointless if the treaty rights were intended to be superseded.

### BPA'S STATUTORY AUTHORITY

BPA's statutory authority is found primarily in the Bonneville Project Act, as amended and supplemented, 16 U.S.C. §§ 832-832l (1970), and the Federal Columbia River Transmission System Act, 16 U.S.C. §§ 838-838k (1970). Sec. 2 (a) of the Bonneville Project Act provides that electric energy generated at the project shall be disposed of by the Administrator. Sec. 2(f) states:

Subject only to the provisions of this Act, the Administrator is authorized to enter into such contracts, agreements, and arrangements, including the amendment, modification, adjustment, or cancellation thereof and the compromise or final settlement of any claim arising thereunder, and to make such expendi-

tures, upon such terms and conditions and in such manner as he may deem necessary.

16 U.S.C. § 832a(f) (1970).

The Bonneville Project Act has been made applicable to the marketing of power from the other projects comprising the Federal Columbia River Power System. 58 Stat. 890, 16 U.S.C. § 832a (1970); 59 Stat. 22; 41 Opn. Atty. Gen. 239 (1955); 260 DM 1.5.C.

The power and energy is to be marketed at rates which are subject to confirmation and approval by the Federal Power Commission and which are to be sufficient to recover " \* \* \* the cost of producing and transmitting such electric power and energy \* \* \*." Subject to such requirement, they are to permit "the lowest possible rates to consumers consistent with sound business principles." 16 U.S.C. § 838g (1970).

Unless Congress were to expressly provide otherwise, any BPA expenditures under the Memorandum of Understanding would have to come from revenues received from the agency's power marketing operations (*i.e.*, ultimately from the power users) or from contributors to trust accounts that BPA may be authorized to establish as an aid to assist in carrying out fisheries restoration or protection activities on a matching fund or coordinated regional basis. However, this opinion is not intended to explore the extent, if any, of this latter authority. *See* 16 U.S.C. §§ 838i(a) and 838i(c) (1970).

Sec. 11(a) of the Federal Columbia River Transmission System Act establishes the Bonneville Power Administration Fund in the Treasury of the United States. 16 U.S.C. § 838i(b) (1970). That Fund is the principal source of BPA expenditures. Sec. 11(b) provides:

The Administrator may make expenditures from the fund, which shall have been included in his annual budget submitted to Congress, without further appropriation and without fiscal year limitation, but within such specific directives or limitations as may be included in appropriation acts, for any purpose necessary or appropriate to carry out the duties imposed upon the Administrator pursuant to law, including but not limited to—

\* \* \* \* \*

(4) marketing electric power;

\* \* \* \* \*

(11) *acquiring such goods and services, and paying dues and membership fees in such professional, utility, industry, and other societies, associations, and institutes, together with expenses related to such memberships, including but not limited to the acquisition and payments set forth in the general provisions of the annual appropriations Act for the Department of the Interior, as the Administrator determines to be necessary or appropriate in carrying out the purposes of this Act. (Italics added.)*

16 U.S.C. § 838i (1970).

The exercise of BPA's authority under these organic acts is affected and limited by other federal laws or policies which are discussed below. It should be understood, however, that the source of BPA's authority is to be found principally in the acts cited above or in lawful delegations from the Secretary of the Interior of authority vested in him. *See, Re-*

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organization Plan No. 3 of 1950, § 2, 64 Stat. 1262, 5 U.S.C. App. II. The other laws or governing policies may be the source of an obligation to exercise its authority in a particular manner or to refrain from certain undertakings until other precautionary or mitigative measures have been assured.

### DISCUSSION

Sec. 2(f) of the Bonneville Project Act quoted above provides a special authority peculiar to BPA that sets it apart from most government agencies. The authority to enter into contracts, agreements and arrangements and make expenditures is subject only to the provisions of the Bonneville Project Act. This constitutes an extremely broad grant of authority. The Comptroller General has recognized this. For example, in his letter of Apr. 26, 1945, to Congressman Mansfield commenting on the proposed amendment of sec. 2(f) to broaden its scope, the Comptroller General said:

The general purpose of the proposed legislation appears to be to broaden the authority of the Administrator of the Bonneville Project so as to enable him to conduct the business of the project with a freedom similar to that which has been conferred on public corporations carrying on similar comparable activities. I am not disposed to disagree with such purpose, in view of the fact that the activities of the Bonneville project are chiefly of a commercial or nongovernmental character.

House Report No. 777, 79th Cong. 1st Sess., p. 21.

The Comptroller General said in Opinion B-105397, Sept. 21, 1951, in concluding that the Administrator had authority to undertake a program of cloud-seeding to induce precipitation in an area above Grand Coulee Dam:

I think there might be some doubt that in directing the encouragement of "the widest possible use of all electric energy that can be generated"—16 U.S.C. 832a (b) (1970)—the Congress contemplated the acquisition of all possible electric energy by any means, natural or otherwise, and were the instant question presented by the head of a department or agency having only the ordinary authority usually granted to the heads thereof, I would not hesitate to advise that appropriated funds were not available for the purpose proposed. However, included in the broad authority vested in the Bonneville Administrator by the Act of Aug. 30, 1937, as amended, is the authority to contract, as contained in 16 U.S.C. 832a(f) (1970) as follows:

"Subject only to the provisions of this chapter, the Administrator is authorized to enter into such contracts, agreements, and arrangements, including the amendment, modification, adjustment, on cancellation thereof and the compromise or final settlement of any claim arising thereunder, and to make such expenditures, upon such terms and conditions and in such manner as he may deem necessary."

The legislative history of the foregoing provision of law indicates that its purpose was to free the Administration from the requirements and restrictions ordinarily applicable to conduct the business of the project with a freedom similar to that which has been conferred on public corporations carrying on similar or comparable activities. In view of such

broad authority, it appears that the scope of the activities contemplated under the act and the appropriate means of accomplishing same, are matters for determination by the Administrator. Hence, while I cannot approve such a contract as herein contemplated, you are advised that if the Administrator should determine that the services to be performed under the proposed contract are necessary for the proper administration of the act, and I might add parenthetically that the responsibility for arriving at such determination is solely his, this Office would not be required to question the legal availability of appropriations made to the Administration for carrying out the purposes of the act, for expenditures made thereunder.

There has been a uniformity in the interpretation of the broad authority granted to the Administrator by sec. 2(f) of the Bonneville Project Act. Many of the limitations applicable to other agencies do not apply to arrangements and expenditures of the Administrator if he determines that they are necessary to carry out the purposes of the Bonneville Project Act. Both the scope of the activities contemplated under the Act and the means of accomplishing them are matters for the sole determination of the Administrator (subject, of course, to the supervision and control of the Secretary of the Interior, 260 DM 1:88).

The subsequent Federal Columbia River Transmission System Act echoes the Bonneville Project Act in stating that the Administrator may acquire such services as he determines to be necessary or appropriate in carrying out the purposes of the Act.

There is the requirement, however, imposed by the Transmission System Act, that proposed expenditures shall be included in the annual budget submitted to Congress. Then, as stated above, "The Administrator may make expenditures from the Fund \* \* \* without further appropriation and without fiscal year limitation, but within such specific directives or limitations as may be included in appropriation Acts \* \* \*."

As noted earlier above, BPA's purpose and activities are similar to a public service corporation and the Bonneville Power Administration Act is designed to give the agency authority to conduct its business "with a freedom similar to that which has been conferred on public corporations carrying on similar comparable activities." The responsibility of developers and operators of hydro-electric power facilities to take measures to protect fish in the rivers of the United States from the effects of the operation of such facilities is a long-standing policy of Congress. The Federal Power Act has provided for more than 40 years that:

The [Federal Power] Commission shall require the construction, maintenance, and operation by a licensee at its own expense of \* \* \* such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce as appropriate.

16 U.S.C. § 811 (1970)

The original Federal Power Act of 1920 authorized the Commission to require fishways. The requirement was made mandatory in 1935.

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The Commission has not limited its requirement of fisheries protection to the construction of "fishways." Other types of mitigation, replacement and even enhancement have also been required. In furtherance of this policy the Federal Power Commission requires a nonfederal applicant for a license to submit Exhibit S:

A report on the effect, if any, of the project upon the fish and wildlife resources in the project area or in other areas affected by the project and proposals for measures considered necessary to conserve and, if practicable, to enhance fish and wildlife resources affected by the project. The exhibit shall include functional design drawings of any fish ladders proposed to be constructed in compliance with section 18 of the Federal Power Act, such other facilities or developments as may be necessary for the protection, conservation, improvement and mitigation of losses of fish and wildlife resources in accordance with sec. 10(a) of the Act, and cost estimates for such facilities and developments. The Applicant shall prepare this exhibit on the basis of studies made after consultation and in cooperation with the U.S. Fish and Wildlife Service, Department of the Interior, and appropriate state fish and wildlife agencies \* \* \*.

18 CFR § 4.41.

This Department has frequently recommended to the Federal Power Commission that it include license conditions requiring nonfederal utilities (including public agencies) to conduct or finance studies to determine the magnitude of project-occasioned losses to fish and wildlife and to prepare or finance a plan to compensate for all project-

occasioned fish and wildlife losses. *See, e.g.,* Department's letter of May 13, 1974, to the Federal Power Commission re Seattle City Light Department's Skagit Project, FPC No. 553. In a subsequent letter of November 3, 1976, on that same project the Solicitor advised FPC that "as trustee for [certain Indian tribes having "secured fishing rights" on the Skagit River] the Secretary of the Interior must protect them from actions which significantly and adversely affect fish habitat and the number or quality of fish available, as secured by their treaty rights."

Federal agencies constructing or operating water-control projects are directed by the Fish and Wildlife Coordination Act to accommodate the means and measures for such conservation of wildlife resources as an integral part of such projects:

The cost of planning for and the construction or installation and maintenance of such means and measures adopted to carry out the conservation purposes of this sec. shall constitute an integral part of the cost of such projects \* \* \*.

16 U.S.C. § 662(d) (1970).

In the case of projects constructed and operated by the Corps of Engineers, this is a function of that agency. But BPA can prescribe installation of additional power facilities at Bonneville, McNary and the Lower Snake River dams. 16 U.S.C. § 832 (1970); 59 Stat. 22.

The Fish and Wildlife Coordination Act also specifically authorizes

the Secretary of the Interior to participate in development, protection, rearing and stocking of fish and in controlling losses. This authority is delegated by the Secretary to the Fish and Wildlife Service. 242 DM 1.1. But he could direct or approve BPA participation in such activity to overcome effects of operation of the Federal Columbia River Power System. Sec. 2, Reorganization Plan 3 of 1950, *supra*. The Coordination Act says, in 16 U.S.C. § 661 (1970) :

For the purpose of recognizing the vital contribution of our wildlife resources to the Nation, the increasing public interest and significance thereof due to expansion of our national economy and other factors, and to provide that wildlife conservation shall receive equal consideration and be coordinated with other features of water-resource development programs through the effectual and harmonious planning, development, maintenance, and coordination of wildlife conservation and rehabilitation for the purposes of secs. 661 to 666c of this title in the United States, its Territories and possessions, the Secretary of the Interior is authorized (1) to provide assistance to, and cooperate with, Federal, State, and public or private agencies and organizations in the development, protection, rearing, and stocking of all species of wildlife, resources thereof, and their habitat, in controlling losses of the same from disease or other causes, in minimizing damages from overabundant species, in providing public shooting and fishing areas, including easements across public lands for access thereto, and in carrying out other measures necessary to effectuate the purposes of said sections; (2) to make surveys and investigations of the wildlife of the public domain, including lands and waters or interests therein acquired or controlled by any agency of the United States; and (3) to accept donations of

land and contributions of funds in furtherance of the purposes of said sections.

A national policy to enrich the understanding of the ecological systems and natural resources is declared in the National Environmental Policy Act:

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

42 U.S.C. § 4321 (1970)

The Congress states that it is the continuing responsibility of the Federal Government to use all practicable means to improve and coordinate federal plans, functions, programs, and resources to carry out the policy of living in productive harmony with nature. 42 U.S.C. § 4331 (1970). All agencies of the Federal Government are directed to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;" to "make available to States, counties, municipalities, institutions and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;" and "initiate and utilize ecological information in the planning and development of re-

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source-oriented projects." 42 U.S.C. § 4332 (1970).

The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal agencies.

42 U.S.C. § 4335 (1970).

These Acts show clearly that Congress has long and universally recognized that both the construction and operation of power dams and facilities are to be made as compatible as possible with fish. Utilities are required to make expenditures for this purpose. This is especially true in the case of anadromous fish whose early rearing and spawning habitat and whose migration routes to and from the sea are so critically impacted by hydroelectric projects.

BPA is authorized to operate with the freedom similar to that of a utility and may take steps to protect the environment from the direct effects of its activities. Operation in accordance with the National Environmental Policy Act and the Fish and Wildlife Coordination Act in connection with his planning and scheduling of the power capabilities and operations is a duty imposed upon the Administrator by law and thus within the authorization of the Federal Columbia River Transmission System Act to make expenditures which have been included in budgets submitted to Congress.

Moreover, the Administrator's authority with respect to requesting additional power facilities in FCRPS projects and scheduling

the power operation of power facilities of that System is really the Secretary's authority as delegated to the Administrator. Reorganization Plan No. 3, *supra*. The Solicitor has held that the Secretary has a trustee duty imposed by law to protect Indian rights. His delegation of power marketing and scheduling authority to the Administrator cannot ignore that trustee duty. Therefore, in the exercise of his power marketing activities the Administrator has a duty to take reasonable measures to protect Indian fishing rights from the consequences of such exercise. This is a duty "imposed upon the Administrator pursuant to law" within the meaning of the Federal Columbia River Transmission System Act.

### SUMMARY

It is becoming increasingly evident that an integral aspect of any electric utility's responsibility in this age of public concern for the environment is to find means and undertake or contribute to measures to minimize adverse effects of its operations on other significant aspects of the environment. A public agency, such as BPA, has a special obligation in this regard. Utility operators are finding that "sound business principles" dictate that their facilities and operations be not only economically feasible but also socially acceptable. (See 1975 BPA Annual Report, pp. 3-8.) For projects on the Columbia River System this means that major at-

tention must be given to anadromous fisheries protection. Meeting increased power needs without providing for such protection is no longer acceptable in the Columbia Basin.

The Congress directed the Administrator to encourage " \* \* the widest possible use of all electric energy that can be generated \* \* \*," 16 U.S.C. § 832 (b) (1970).

The federal courts have held that the Indian tribes which are parties to the Memorandum of Understanding have vested fishing rights on the Columbia River System which the United States is obligated to respect and protect. Power operations of the Federal Columbia River Power System have an effect on those rights and certain contemplated power operations might be subject to curtailment if reasonable and appropriate mitigative or restorative measures for fisheries are not undertaken.

The Comptroller General has held that sec. 2(f) is sufficient authority for the Administrator to undertake cloud-seeding if he found it necessary "for the proper administration of the act." The Comptroller General pointed out that such a decision is solely for the Administrator to make. As the Memorandum of Understanding with the Indian tribes points out, the operation of the Federal Columbia River Power System for power production may be subject to restraints on peaking and rates of flow for the protection of the fishery resource, and any fishery management or improvement programs which would permit FCRPS operations for greater or

more flexible power production would be of direct benefit to users of BPA power.

A fishery management program or a fishery improvement program which would permit use of the river for greater or more flexible power production is certainly as directly connected with the "widest possible use of all electric energy that can be generated" as is a cloud-seeding program which is intended to produce additional precipitation in upper reaches of tributaries of the Columbia River. Such cloud-seeding has been held to be within the Administrator's authority. By the same token, so is a program to help restore the Columbia River anadromous fishery if it will help make possible operation of the FCRPS projects so as to produce more power for the benefit of consumers or more effective scheduling of power generation than would otherwise be allowed.

The Memorandum of Understanding with the Indian tribes does not prescribe or describe any specific research, study, or project which would be undertaken pursuant to it. It merely commits the parties to forge a partnership for undertaking a program aimed at helping to restore the Columbia River anadromous fishery. The program is to be conducted "on a biologically sound and fiscally responsible basis, in coordination with all other fishery interests for the betterment of the region as a whole." It calls for future identification of specific projects to be implemented "in a coordinated regional context"

and provides for an early identification of a first year pilot program.

It is not the purpose of this opinion to consider BPA's authority to assist in funding any specific project. Instead, this opinion is directed to the more general question of whether the Administrator has authority to include as a line item in his annual budget submitted to Congress pursuant to the Federal Columbia River Transmission System Act an appropriate study or project to be undertaken by one or more of the federally recognized treaty Indian tribes having fishing rights on the Columbia River, one or more state fisheries agencies, a regional entity, or some combination thereof.

Where the Administrator finds that such study or project will better enable him to optimize the operation of the Federal Columbia River Power System or increase the amount of firm or peaking power and energy that can be produced and disposed of from such power system, it is our opinion that he has this authority under the statutory provisions quoted or cited in this opinion if he finds that such expenditure, and the terms, conditions and manner in which it would be expended, is necessary to carry out his power marketing responsibilities under the Bonneville Project Act and other related statutes. Under the Memorandum of Understanding the Administrator retains the final approval authority over expenditure of all BPA funds

committed to the programs. We will be happy, if you deem it necessary, to review and advise you with respect to the applicability of this authority to any specific activity or project that may be proposed pursuant to the Memorandum of Understanding at such time as the details and justification for such activity or project are available.

Finally, it should be recognized that authority to fund or provide for fisheries restoration or protection programs to overcome or mitigate the effects of facilities associated with the FCRPS is not exclusive with the Administrator. The agencies which construct and operate the multipurpose projects that comprise the system—as well as the federal and state fisheries agencies themselves—also have authority and responsibilities in this field. Acting under express congressional (or state) authorization and direction, these agencies have been undertaking and are continuing to undertake research and program activities and projects for this purpose. Therefore, any BPA activity in this regard should take into account the prescribed or contemplated activities and availability of funds of these other agencies in order to avoid conflict, duplication or substitution of programs that are more properly their responsibility.

ROBERT E. RATCLIFFE,  
*Regional Solicitor.*

OMAR W. HALVORSON,  
*Acting Solicitor.*

**ADMINISTRATIVE APPEAL OF  
DOUGLAS STOUT v. COMMIS-  
SIONER, BUREAU OF INDIAN  
AFFAIRS**

5 IBIA 260

*Decided December 3, 1976*

Appeal from a decision of the Commissioner, Bureau of Indian Affairs, affirming Area Director's action in denying withdrawal of certain bids because of mistake.

Reversed.

**Indian Lands: Contracts: Formation  
and Validity: Bid and Award:  
Mistakes**

Where the Bureau of Indian Affairs knew or should have known of the bidder's mistake, a bidder on Indian lands is entitled to recover deposits where he is guilty of mistake in misreading of specification.

**APPEARANCES:** Paul E. Northcutt, Esq., for appellant; Rex E. Herren, Esq., Office of the Field Solicitor, Anadarko, Oklahoma, for appellee, Bureau of Indian Affairs.

**OPINION BY  
ADMINISTRATIVE JUDGE  
SABAGH**

**INTERIOR BOARD OF  
INDIAN APPEALS**

The pertinent facts regarding this matter are set forth in Administrative Law Judge Jack M. Short's Recommended Decision dated Oct. 12, 1976. Accordingly, they are not repeated here.

Consideration has been given to the complete record, including contentions and arguments made by both appellant and appellee.

We find no merit to the contentions and arguments of the appellee.

The Board is in agreement with the findings and conclusions of Judge Short and adopts his findings and recommended decision attached hereto and dated Oct. 12, 1976, as its own.

We agree that the Bureau owed a certain responsibility to its Indian ward or wards. However, where an obvious mistake is existent, the Bureau owes a corresponding responsibility to the appellant not to knowingly enrich its ward or wards to the detriment of said appellant. We find that the Bureau was fully aware of the appellant's mistake in bids through its own appraisals, disparity in the bids of the appellant and other bidders, and finally by being alerted to the mistakes by appellant's wife while the Bureau was in the process of opening said bids and again prior to consideration of items 22 and 33.

We conclude that the appellant is entitled to recover his forfeited deposits applicable to items 22 and 33, totaling \$3,500.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1(2), the decision of the Commissioner of Indian Affairs affirming the Area Director is **REVERSED**, and it is **ORDERED**, that the forfeited deposits regarding items 22

and 33 totaling \$3,500 be returned to the appellant, Douglas Stout.

MITCHELL J. SABAGH,  
*Administrative Judge.*

WE CONCUR:

ALEXANDER H. WILSON,  
*Administrative Judge.*

WM. PHILIP HORTON,  
*Board Member.*

October 12, 1976

**FINDINGS OF FACT AND RECOMMENDED DECISION**

On June 24, 1976, the Interior Board of Indian Appeals issued an Order referring this administrative appeal by Douglas Stout to the Hearings Division, Office of Hearings and Appeals, for an expeditious fact-finding hearing before an Administrative Law Judge, who would then submit findings of fact and a recommended decision to the Board.

By letter dated June 24, 1976, the Chief Administrative Law Judge, Hearings Division, Office of Hearings and Appeals, assigned the case to this office for such hearing, findings of fact, and recommended decision and transmitted there-with the case record.

Pursuant to notice issued July 8, 1976, such a hearing was held on Thursday, Aug. 5, 1976, at the Page Belcher Federal Building, Tulsa, Oklahoma. Douglas Stout, the appellant, appeared in person and by his lawyer, Paul E. Northcutt, Esq. The Bureau of Indian Affairs was represented by Rex E. Herren, Esq., Assistant Field Solicitor.

The evidence adduced at the hearing consists of testimony, which has been transcribed, from: Douglas Stout and his wife, Joyce; Floyd L. Stelzer, Area Oil and Gas Supervisor, U.S. Geological Sur-

vey; and, Herman J. Lewis, Chief, Division of Trust Responsibilities, Bureau of Indian Affairs, Anadarko Area Office, plus the documentary evidence admitted into evidence, to wit: ALJ Exhibit #1, which is a copy of Invitation No. 36, in blank, entitled, *Invitation For Bids—Sale of Indian Land* to which is attached a four page itemized advertisement of the real property offered for sale with the legal descriptions and other data thereon; and, ALJ Exhibit #2, which is a copy of the bids submitted by Douglas Stout on the Invitation For Bids form with the Notice Of Award To Successful Bidder completed thereon.

From the record and this evidence, I find the following facts and recommend a decision.

Douglas Stout is a thirty-six year old truck driver who resides with his wife, Joyce, on his 35 acre farm near Ponca City, Oklahoma which he farms, along with other land he has leased, on a part-time basis. He completed the 11th grade in school then entered the Marine Corps where he earned a high school diploma. He has never been engaged in the oil and gas business and the only mineral rights he owns are under his 35 acre farm. In 1974, he made an unsuccessful bid on Indian land offered for sale by the Pawnee Indian Agency and by having made that bid, he received a copy of Invitation No. 36 from the Pawnee Agency by mail sometime in June, 1975. Because he still wanted to buy more land, he selected two tracts of interest to him thinking that the surface and one-half of the minerals were being offered for sale on each tract. From the legal description of the two tracts, he located and made a physical inspection of them; decided he wanted to bid on them and visited two banks in making arrangements to borrow the money for both the bid deposit and the full purchase price. Both bankers were furnished the invitation for bids for examination but neither noticed that minerals only were being sold under the

two tracts. He then prepared his bid accordingly.

He didn't appear at the sale in 1974 and learned later that he narrowly missed being the successful bidder. To avoid that possibility this time, even though he couldn't attend because of his job, he had his wife take the bid to the Agency on the date of the sale with instructions to increase the bid if necessary, up to a maximum sum.

On the morning of July 8, 1975, the day of the sale, Mrs. Stout appeared at the Pawnee Agency and submitted the sealed bid at 8:10 a.m. (See Area Director's Decision) and awaited the opening of the bids at 10 a.m. The Stout bids for the two tracts are on one bid form. See ALJ Exhibit #2.

There is no dispute as to what happened next. A minute or two after 10 a.m., the Agency Realty Officer closed the bidding then announced that item #33 on the advertisement contained an error in that it was advertised as not having an oil and gas lease thereon when in fact there was an oil and gas lease on the minerals described therein.

When Mrs. Stout heard him say something about "minerals only," she suddenly realized that Item #33 was for "minerals only." She quickly looked at Item #22 and saw that it read the same. She then asked the Realty Officer if Item # 33 was for mineral rights only and he said, "Yes." Mrs. Stout then said, "I wish to withdraw my bid." At that time, the bids had not been opened. But, the Realty Officer told her she could not withdraw her bid and in response to her question "What do I do?"; he said, "You just have to forfeit your bid." (Tr. 7-8.)

Then, the opening of the bids commenced and were read aloud in the order listed on the advertisement. When the items on which Mr. Stout had bid were reached, Mrs. Stout renewed her request to withdraw his bid(s). The request was again rejected on each item. When the Stout bid was read, along with the other bids on the same tracts, laughter broke out. (Tr. 8.) The record shows that three

bids were received on each of two tracts. They were:

*Item 22*

Thomas G. Lamb-----	\$604
Douglas Stout-----	25, 000
Wilbur Ingmire-----	800

*Item 33*

Thomas G. Lamb-----	\$755
Douglas Stout-----	10, 000
Harry Anderson-----	506

Mr. Floyd L. Stelzer testified that as of July 7, 1975, the U.S. Geological Survey appraised the minerals under Item #33 at \$30 an acre. That would be one-half of \$30 times 94.94 acres for a total of \$1,469.10 for the minerals being offered for sale. And, he testified that as of Jan. 10, 1975, the minerals under Item #22 were appraised by the U.S.G.S. at \$20 an acre. That would be one-half of \$20 times 80 acres for a total of \$800 for the minerals being offered for sale.

Mr. Herman J. Lewis testified: that he attended the sale at the Pawnee Agency on July 8, 1975, in his capacity as Chief, Division of Trust Responsibilities, Bureau of Indian Affairs, Anadarko Area Office, to assist Henry Sheridan, the Agency Realty Officer, in conducting the sale, in whatever way he could and to conduct the oral auction portion of the sale; that he had no supervisory authority over the Pawnee Agency but did have a technical responsibility to it; and, that Mr. Sheridan had since retired from the Bureau. Mr. Lewis did not dispute Mrs. Stout's testimony regarding her requests to withdraw her bids but he concurred with Mr. Sheridan's refusal to permit the withdrawal. It is his recollection that Mrs. Stout stated they thought they were bidding on surface and for that reason wanted to withdraw their bid now that it was clear the minerals only were being sold. He further testified that if she had said she wanted to withdraw the bid on Item #33 because of the oil and gas lease error, her request would have been granted but not otherwise.

I find that Douglas Stout made a mistake in reading the advertisement. It

plainly states MINERALS ONLY on the two items he bid on. Clearly, he was negligent and the Invitation For Bids states unequivocally that negligence on the part of the bidder confers no right to withdraw the bid after the time for submitting the bids has expired.

By signing the invitation for bids form, Mr. Stout expressly agreed to be bound by the terms and conditions stated therein. His wife's request to withdraw the bids came after the time for submitting the bids had expired. It is immaterial whether the bids had been opened or not. Actually, the bids were being physically opened and arranged in the proper order for reading but none had been read when she made her initial request. Because it subsequently notified him he was the high bidder, requested the balance of the purchase price be remitted within the required thirty days which he has not to this date done and doesn't intend to, it appears that the Bureau had every right to forfeit the 10% or \$3,500 deposited by Mr. Stout.

So, the decision of the Commissioner of Indian Affairs dated, Dec. 15, 1975, which affirms the decision of the Area Director, dated Sept. 15, 1975, to award the sale to Mr. Stout on his successful bid, is apparently unassailable.

But, there is a principle of law called the law of mistaken bids. It is explained in some detail in the case of *Ruggiero v. United States*, 420 F. 2d 709 (1970), by the United States Court of Claims. The facts therein are analogous to the case at hand and are as follows. Five members of the Ruggiero family residing near Los Angeles and engaged in various occupations were also doing business as partners in a land development company which entered a sealed bid on several of 43 tracts of government land offered for sale by the General Services Administration in the vicinity of San Diego. That invitation for bids permitted bids on individual tracts, groups of tracts, or the entire lot. It provided sealed bids would

be received until a certain date and hour, then opened, and required a bid deposit of 10 percent of the amount of each bid. And, among other provisions, it stated that: "modifications or withdrawals \* \* \* received \* \* \* after the exact time set for opening of bids will not be considered unless: (1) they are received before award is made; and either (2) \* \* \* late receipt was due solely to delay in the mails \* \* \*; or, \* \* \* due solely to mishandling by the Government after receipt \* \* \*." (Italics added.)

The bids were opened on the date specified and a few days later, the Ruggieros were notified their bid on one parcel was rejected and their deposit returned. A few days later, the Ruggieros protested the rejection in writing and stated their bids on it and two other parcels which were all contiguous were to be considered as a group and unless they were so considered and awarded to them, they wanted their deposit back on all three of the bids. The Government refused, forfeited the bid deposit and the Ruggieros brought suit in the United States Court of Claims to recover their bid deposit. That Court entered judgment in favor of the Ruggieros for the full amount of their bid deposit upon finding that they, in fact, had made a mistake in their bid and by applying the law of mistaken bids. At page 713 of 420 F. 2d, that Court states: Finally, we come to the issue of mistake. It is not necessary to establish the following at any length: if a bidder discovers that he has made a mistake in his bid and so advises the contracting officer, *even after bid opening*, but before award, he is not bound by his bid. (citations of numerous cases omitted.) \* \* \* In all of the cases cited above the bidders were, in fact, guilty of egregious blunders. As we pointed out in *Cernick v. U.S.*, 372 F. 2d 492, 178 Ct. Cl. 498 (1967), what we are really concerned with is the overreaching of a contractor by a contracting officer when the latter has the knowledge, actual or imputed as something he

ought to know, that the bid is based on or embodies a disastrous mistake and accepts the bid in face of that knowledge. The correction of the mistake, perhaps in the teeth of general conditions or specifications, by rescission or reformation, represents an application of equitable principles in a legal action. The mistake, to invoke such principles, must be, as in the cases cited, a clear cut clerical or arithmetical error, or misreading of specifications, and the authorities cited do not extend to mistakes of judgment. \* \* \*

Then, at p. 715 of 420 F. 2d, that Court adds: " \* \* \* (T)hat the good faith of a mistaken bid claim obviously is strongly supported if the claim is first made before the bids are opened and the awards are known or capable of surmise." \* \* \*

The facts in the case at hand closely parallel those in *Ruggiero, supra*. Both bidders were clearly negligent in the preparation of their bids. The Ruggieros telephoned before the close of bidding and made an oral request that their bids be considered a group bid but such an oral request was not permitted by the invitation for bids; however, they did reveal their mistake after the opening of the bids but before the award. Here, Mrs. Stout requested the withdrawal of her husband's bid before the opening and reading of the bids (granted, the envelopes were being slit by Mr. Lewis when she made her request but the bids had not been removed from the envelopes and read) when she realized only the minerals were being offered for sale whereas the bid was for the surface and one-half of the minerals. She renewed her request when items 22 and 33 were reached in the reading of the bids. The testimony is uncontroverted that the reading of each Stout bid drew laughter from the Agency Realty Officer and the other bidders—obviously because of the wide disparity between each Stout bid and the other two bids.

In both cases, the bidders were bound by the terms and conditions of the invitations for bids and both failed to correct or withdraw their bid within the permissible time. But, both made a mis-

take in their bid. In *Ruggiero, supra*, the Court found that the contracting officer knew or should have known that the bid was a mistake or at least he was alerted to that possibility and, by not making further inquiry the knowledge of a mistaken bid was imputed to him. In our case, the Agency staff was informed that a mistake had been made prior to the opening of the bid, again when each bid was read and the wide disparity between the Stout bids and the other bids on the same tracts buttress Mrs. Stout's statement that a mistake had been made. I find that the Agency staff had actual knowledge prior to the opening of the bids that Mr. Stout had made a mistake on his bid and that knowledge was reinforced when the Stout bid was opened and read.

While some improvement might be made in the invitation for bid forms used by the Agency and thus lessen bidder confusion and minimize mistakes, the advertisement here plainly stated that items 22 and 33 were minerals only. It is not necessary to determine why or how the Stout bid mistake occurred. Again, the Court, at p. 716 of 420 F. 2d, speaks to the point: "The law of mistaken bids is made for those mistakes, among others, which are perfectly inexplicable." But, it is necessary to determine whether it falls within any of the three types of errors which the law of mistaken bids will correct, i.e., a clear cut clerical or arithmetical error or misreading of specifications. I find that the Stout bid mistake resulted from a misreading of the specifications.

The *Ruggiero* case, *supra*, has been cited with approval by the United States Court of Claims in the following cases: *Chris Berg, Inc. v. U.S.*, 426 F. 2d 314 (1970); *Space Corporation v. U.S.*, 470 F. 2d 536 (1972); *Dale Ingram, Inc. v. U.S.*, 475 F. 2d 1177 (1973); *Highway Products, Inc. v. U.S.*, 530 F. 2d 911 (1976); and, *Tony Downs Foods Company v. U.S.*, 530 F. 2d 367 (1976).

Thus, I conclude as a matter of law that the law of mistaken bids should apply to the facts in this case and that the

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Bureau of Indian Affairs should return the bid deposit in the amount of \$3,500 to Douglas Stout.

#### *Recommended Decision*

It is my recommendation to the Interior Board of Indian Appeals that it enter an Order requiring the Bureau of Indian Affairs to return the bid deposit in the amount of \$3,500 to Douglas Stout.

#### *Exceptions Permitted*

43 CFR 4.368 provides that within 30 days after service of the foregoing recommended decision, any party may file with the Board exceptions thereto or any part thereof, or to the failure of the judge to make any recommendation, finding or conclusion, or to the admission or exclusion of evidence, or other ruling of the judge, supported by such legal brief as may appear advisable. Such exceptions should be filed with the Interior Board of Indian Appeals, 4015 Wilson Boulevard, Arlington, Va. 22203.

Done at the City of Tulsa, Oklahoma, on this 12th day of October 1976.

JACK M. SHORT,  
*Administrative Law Judge.*

UNITED STATES v. GLENN C.  
BOLINDER AND L. O. TURNER,  
ET AL.

28 IBLA 187

Decided December 6, 1976

Appeal from the decision of Administrative Law Judge Robert W. Mesch

dismissing Government mining contest complaints Utah 10693 and Utah 10696.

Affirmed, as modified.

#### **1. Mining Claims: Locatability of Mineral: Generally—Mining Claims: Specific Mineral Involved: Generally**

A valuable deposit of geodes, round stones with crystalline centers and composed of recognized mineral substances, which possess an economic value in trade and the ornamental arts, and which are being removed by actual mining operations, is subject to location under the mining laws. *South Dakota Mining Co. v. McDonald*, 30 L.D. 357 (1900), distinguished.

#### **2. Contests and Protests: Generally—Mining Claims: Contests—Rules of Practice: Government Contests**

In a mining contest, a matter not charged in the complaint may only be considered by the Administrative Law Judge if it was raised at the hearing without objection and the contestee was fully aware that the issue was raised.

#### **3. Mining Claims: Common Varieties of Minerals: Generally**

In order to establish that a type of stone material is not a common variety under the Act of July 23, 1955, a mining claimant must demonstrate that: (1) the mineral deposit has a unique property and (2) the unique property gives the deposit a distinct and special value. Where evidence establishes that geodes in a particular deposit have unique properties distinguishable from other types of stones which give the deposit of geodes a distinct and special value, the fact that the geodes may be similar to geodes from other areas which have similar properties and values is not sufficient evidence to establish that the deposit of geodes is

a common variety of stone within the meaning of the Act of July 23, 1955.

**APPEARANCES:** Reid W. Neilson, Esq., Assistant Regional Solicitor, Department of the Interior, Salt Lake City, Utah, for appellant-contestant; Craig S. Schwender, Esq., Tooele, Utah, for appellees-contestees.

*OPINION BY ADMINISTRATIVE JUDGE THOMPSON*

*INTERIOR BOARD OF LAND APPEALS*

This is an appeal by the Government from a decision of Administrative Law Judge Robert W. Mesch, dated Jan. 9, 1975, dismissing mining contest complaints Utah 10693 and 10696. Utah 10693 was filed by the Bureau of Land Management (BLM) against Glenn C. Bolinder and challenged the validity of his Eureka No. 1 and Lucky Strike No. 1 lode mining claims. Utah 10696 was filed by BLM against L. O. Turner and H. C. Ross and challenged the validity of their Treasure Chest Nos. 1-6 lode mining claims.

Each complaint listed the same charges as follows:

1. Minerals have not been found within the limits of the claims in sufficient quantity or quality to constitute a valid discovery.
2. Geodes are not subject to mineral location.
3. Lands embraced within the subject claims are non-mineral in character.

Upon the timely filing of answers denying the charges, a consolidated

hearing was held before Judge Mesch on Sept. 25, 1974. At the hearing and thereafter BLM argued that the claims were also invalid because the geodes on the claims are a "common variety" of geode within the meaning of 30 U.S.C. § 611 (1970) and because appellees have filed lode claims on placer material.

In his decision, Judge Mesch held that the issue of proper location as lode or placer claims and the issue of common variety were not properly raised in the contest complaints. He found that geodes are subject to location under the mining laws, ruled that the Government had not presented a prima facie case on the issue of the discovery of a valuable mineral deposit, and determined that the land was mineral in character. He then dismissed the complaints because the evidence and the law did not "support the charges."

BLM argues that Judge Mesch erred in finding geodes to be a locatable mineral, in ruling that the issue of common variety was not included in the complaints, and in not holding that the geodes on the claims are a common variety of geode. BLM also asserts that the claims should be invalidated as lode claims on placer material. The arguments of BLM fail to persuade us that the decision of Judge Mesch dismissing the complaints was in error.

The testimony at the hearing indicates that the geodes taken from appellees' mining claims are commonly known as "Dugway" geodes

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(Tr. 83-84).<sup>1</sup> All the witnesses agreed that Dugway geodes are similar to each other and to geodes found in other parts of the United States and in Mexico (e.g., Tr. 24-26, 75-76, 112).

Judge Mesch noted the following about the testimony on geodes (Dec. 6):

The uncontradicted evidence in this case shows that the substances or materials found inside the geodes are minerals (Tr. 40); that when cut or broken open, different stones and crystals are found in varying degrees (Tr. 110); that the interior of the geodes, even without polishing, presents a beautiful and pleasing appearance (Tr. 26, 39, 46; Exs. A, B, C); that the geodes are obtained in what would be considered a typical mining operation (Tr. 58, 114, 115, 120); and that the geodes can be and are sold at remunerative prices (Tr. 55, 58, 97). One of the contestees testified that he sells the geodes uncut for forty-five cents per pound wholesale with the purchaser paying the shipping costs (Tr. 97, 110, 111, 115); that with a large backhoe that he has on the claims, he can recover as much as one ton of geodes in two hours (Tr. 97, 124); and that his mining costs are in the neighborhood of twelve to fifteen cents per pound of geodes (Tr. 108).

<sup>1</sup> The Department of the Interior's *Dictionary of Mining, Mineral and Related Terms* (1968) defines geode at page 487 as:

"a. A hollow nodule or concretion, the cavity of which is commonly lined with crystals of calcite or quartz; some are lined with smooth chalcedony or limonite. Most are formed of crystalline silica which may or may not have a shell of chalcedony, others are composed of limonite, colemanite, celestite, barite, or other minerals, and most have been formed in shales or other soft rocks. \* \* \* Fay; Hess. b. The cavity in a geode. Webster 3d."

During their testimony, the appellees described the various uses of geodes. Cut and polished geodes, both solid and hollow, are used for decorative purposes in homes and stores (Tr. 59, 89), and are also used for bookends, desk pen and pencil sets, and bases for lamps and other objects (Tr. 88, 99). The solid-interior geodes can be cut up, polished and made into typical gemstone products such as rings, necklaces and bolo ties (Tr. 68, 81, 98-99).

[1] The initial issue is whether geodes are a mineral subject to location under the mining laws. The hearing produced no evidence from which a conclusion may be drawn that geodes should not be considered subject to location. Therefore, we must examine Departmental policy on the locatability of geodes and on the general principles of locatability, as expressed in prior decisions. BLM argues that the decisions in *South Dakota Mining Company v. McDonald*, 30 L.D. 357 (1900); *Earl Douglass*, 44 L.D. 325 (1915); and *United States v. Bienick*, 14 IBLA 290 (1974), are dispositive of this issue. However, we find no definite ruling in these decisions, nor in other Departmental decisions, that geodes are not subject to location.

An examination of the decisions cited by BLM reveals that *South Dakota Mining Company v. McDonald*, *supra*, is the source for the suggestion that geodes are not locatable. In *United States v. Bienick*,

*supra*, the mining claim was for gravel which the decision found to be a common variety. The opinion briefly stated at 296:

\* \* \* As to the sales of crystalline deposits, such specimens are valuable as natural curiosities but are not subject to location under the mining law. \* \* \*

The only authority cited for this proposition is the *South Dakota* decision. Administrative Judge Stuebing, in his concurring opinion, points out that the claimants had advertised for the sale of the crystals for 3 months, and that the total sales amounted to about \$300. *United States v. Bienick*, *supra* at 303. There is no indication the claimant could even recoup his costs from such sales. It is apparent from reading the entire decision in *Bienick* that a general finding was made that there was not a valuable mineral deposit within the claims because mineralization was not sufficient to support the discovery of a valuable mineral deposit. The decision does not provide a ruling that crystalline deposits are never subject to location. Further, the decision did not involve geodes, so it is not a precedent for a holding on deposits of geodes.

The decision in *Earl Douglass*, *supra*, ruled that fossil remains of prehistoric animals are not materials recognized as mineral by standard authorities. The decision cited *South Dakota* for the principal that land containing formations and material valuable as natural curiosities, but not mineral substances usually developed by mining

operations, is not mineral land within the meaning of the mining laws.

*South Dakota Mining Co. v. McDonald*, *supra*, stands, therefore, as the only case brought to our attention that actually involved geodes. We must examine the circumstances and language of that decision in order to ascertain what policy guidelines were being set forth, and if it is a clear precedent for holding that geodes cannot be located under the mining laws.

In *South Dakota*, two parties claimed land which contained a cavern described as a great natural wonder. One party sought the land under the homestead laws and the other under the mining laws. The mining claimant protested against the homestead entry asserting the land to be mineral in character and the homestead entry fraudulent. After initial consideration, the Department ordered a further hearing on the issues in the case, stating, as quoted at 30 L.D. 359:

This action is not to be construed as a determination of the question, so ably argued by the attorneys on each side, as to whether land chiefly valuable for its crystalline deposits can be entered under the mining laws of the United States.

After the second hearing, the Commissioner of the General Land Office (predecessor of the Bureau of Land Management) found the land to be nonmineral in character but held the homestead entry for cancellation because there was insufficient evidence of cultivation and improvement to establish the good faith of the entryman as a home-

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stead claimant. On appeal, these findings were sustained. As pertinent to the question involved here, there is only the following discussion at 30 L.D. 360 sustaining the finding of nonmineral character of the land:

Large quantities of crystalline deposits, and formations of various kinds, such as stalactites, stalagmites, geodes, "box-work," "frost-work," etc., etc., are found in the cavern. Specimens of these deposits and formations have been made the subject of sale at remunerative prices by the contending parties, not as minerals but as natural curiosities. Charge has also been made for admittance to the cavern and for the privilege of viewing its many natural wonders. The record clearly demonstrates that it is the source of revenue which these things furnish that the respective parties are striving to control.

The testimony introduced by the protestant company for the purpose of showing that the cavern contains valuable deposits of gold, marble, building stone, paint rock, and other mineral substances, falls far short of proving the land to be mineral in character within the meaning of the mining laws. It is not shown to contain deposits, in paying quantities, of any of the substances mentioned, or of any other substance such as is usually developed by mining operations. No serious effort has ever been made to develop the land, or any part of it, as a mining claim. The decision of your office holding the land to be non-mineral is clearly correct.

The question which was left open when the second hearing was ordered, *i.e.*, whether land chiefly valuable for crystalline deposits may be considered mineral in character, was not resolved by the Departmental decision after that hearing.

The two paragraphs quoted above do not answer the question. Instead, it is apparent that the finding of nonmineral character of the land was based upon the lack of a good faith mining operation. The exploitation of the cave and its contents were considered as outside a normal mining operation. The decision recommended action to reserve the cave for the general public, which subsequently was accomplished. The case should be considered in light of the peculiar circumstances presented there and the interest in preserving for the public the unique values of the cave. We do not believe the case is a precedent for the proposition that no crystalline deposits, including deposits of geodes, can ever be considered locatable under the mining laws.

Under the mining law, "lands valuable for minerals" are reserved from sale, unless otherwise authorized by law. R.S. § 2318, 30 U.S.C. § 21 (1970). Lands in which "valuable mineral deposits" are found may be occupied and purchased and such deposits are open to exploration and purchase. R.S. § 2319, 30 U.S.C. § 22 (1970). Interpretations of these two quoted phrases are the sources for determining the locatability of particular substances under the mining laws. Often, these interpretations have arisen in the context of a determination of the mineral character of the land. From such cases, the classic definitions of "mineral" and "locatability" have stemmed. For example, the Supreme Court in

*Northern Pacific Railway v. Soderberg*, 188 U.S. 526, 536-37 (1903), struggled to find a definition of the words "mineral lands" and concluded that at least they include "not merely metalliferous lands, but all such as are chiefly valuable for their deposits of a mineral character, which are useful in the arts or valuable for purposes of manufacture." *Layman v. Ellis*, 52 L.D. 714 (1929), relied on this and other definitions, including the following quotation (at 719-20) from Lindley on Mines, sec. 98, where it is stated:

The mineral character of the land is established when it is shown to have upon or within it such a substance as—

(a) Is recognized as mineral, according to its chemical composition, by the standard authorities on the subject; or—

(b) Is classified as a mineral product in trade or commerce; or—

(c) Such a substance (other than the mere surface which may be used for agricultural purposes) as possesses economic value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts;—

And it is demonstrated that such substance exists therein or thereon in such quantities as render the land more valuable for the purpose of removing and marketing the substance than for any other purpose, and the removing and marketing of which will yield a profit; or it is established that such substance exists in the lands in such quantities as would justify a prudent man in expending labor and capital in the effort to obtain it.

Both Congress and the Department have further delimited what mineral materials are subject to location. The Mineral Leasing Act of 1920, *as amended*, 30 U.S.C. § 181 *et seq.* (1970), provides for leasing land, rather than the location of

mining claims, for certain mineral materials. Section 3 of the Surface Resources Act of 1955, 30 U.S.C. § 611 (1970), removes common varieties of certain minerals from the operation of the mining laws. The Department has settled on a policy with regard to certain "non-validating uses." For example, mineral material of indiscriminate nature used only for road base, fill or similar purposes for which almost any earth material may be used has consistently been declared not subject to location under the mining laws. *E.g.*, *United States v. Harenberg*, 11 IBLA 153, 156 (1973); *United States v. Barrows*, 76 I.D. 299, 306 (1969); *aff'd*, *Barrows v. Hickel*, 447 F. 2d 80 (9th Cir. 1971). Similarly, agricultural soil additives which have no chemical effect on the soil but are merely physical amendments are not subject to location. *United States v. Robinson*, 21 IBLA 363, 82 I.D. 414 (1975); *United States v. Bunkowski*, 5 IBLA 102, 79 I.D. 43 (1972). Note by contrast, for example, the following disparate materials which have been determined minerals subject to location: diamonds, 14 Op. Atty. Gen. 115 (1872); marble, *Pacific Coast Marble Co. v. Northern Pacific R.R. Co.*, 25 L.D. 233 (1897); guano, *Richter v. Utah*, 27 L.D. 95 (1898); and onyx, *Utah Onyx Development Co.*, 38 L.D. 504 (1910).

There is no doubt that a geode is composed of recognized mineral substances which would be individually locatable under the mining laws unless found to be a common variety subject to 30 U.S.C. § 611

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(1970). The testimony at the hearing indicated that geodes possess an economic value in trade and the ornamental arts, apart from whatever commercial value may be attributed to their uniqueness as a so-called "natural curiosity." The appellees testified that the geodes are removed through mining operations which they conduct or which are conducted by third parties with the particular appellee receiving a share of the geodes removed (Tr. 56-59, 113-15, 120).

It is evident from the testimony at the hearing that geodes have a value in their raw state in addition to any enhanced value from subsequent processing or craftwork. *Cf. United States v. Alexander*, 17 IBLA 421, 433-34 (1974); *United States v. Stevens*, 14 IBLA 380, 391, 81 I.D. 83, 87 (1974). The record indicates the appellees are using the claims for the mining of geodes, and not simply using the claims for other purposes. *Cf. United States v. Stevens*, *supra* at 392-93, 81 I.D. at 88-89; *United States v. Elkhorn Mining Co.*, 2 IBLA 383 (1971), *aff'd.*, *Elkhorn Mining Co. v. Morton*, Civil No. 2111 (D. Mont., January 19, 1973). For these reasons we distinguish *South Dakota Mining Co. v. McDonald*, *supra*, from the present case.

We find no justification for ruling that geodes *per se* are not subject to location under the mining laws. Where a mining claimant has located his claim on a sufficient quantity of geodes and is conducting

actual mining operations to extract the geodes, we hold that such a mineral deposit is subject to location under the mining laws. Furthermore, there is simply no evidence upon which we could make a finding that these deposits of geodes are not valuable mineral deposits. We are not, however, ruling that the claims are valid, but only that the Government's contest complaints must be dismissed because there is no evidentiary basis to support the charges. *Cf. United States v. Taylor*, 19 IBLA 9, 82 I.D. 68 (1975).

[2] BLM next argues that Judge Mesch erred in ruling that the issue of common variety was not raised in the contest complaints. In its conclusion, BLM also asserts that the Judge erred in not invalidating the claims as lode locations on placer material. Since the Judge actually dismissed the proper location issue as not raised in the contest complaint, we will consider both issues together.

The content of contest complaints is governed by regulations which, among other things, require a "statement in clear and concise language of the facts constituting the grounds of the contest." 43 CFR 4.450-4(a)(4). The purpose of this requirement is to give the contestee sufficient notice of the charges to prepare his case.

The BLM contest complaints, *supra*, charge lack of discovery, nonlocatability of geodes and non-mineral character of the land. Such charges raise a variety of issues.

They do not, however, raise the issue of a lode location on placer material. Nor was this issue properly raised at the hearing. We therefore affirm Judge Mesch's ruling dismissing this issue as not included within the contest complaints, without reaching any conclusion as to the merits of this particular allegation. See *United States v. McElwaine*, 26 IBLA 20 (1976).

The issue of common variety, however, was raised during the direct examination of the BLM mining engineer (particularly Tr. 30-33). Appellees' counsel cross-examined this witness on this precise point (Tr. 35-37). Questions relating to this issue were asked during the appearances of the appellees as witnesses (e.g., Tr. 71, 74, 76-77, 78-79, 91). No objection was made at any time during the hearing and no prejudice has been asserted by appellees concerning the introduction of this issue. A matter which is raised without objection at the hearing, and of which the contestee is fully aware, may be considered by the Administrative Law Judge in reaching his decision. *United States v. Alexander*, *supra* at 421, 430-31; *United States v. Harold Ladd Pierce*, 75 I.D. 270, 275-78 (1968). We therefore find that the issue of common varieties was presented and that Judge Mesch erred in his ruling that it was not.

[3] "Common varieties of sand, stone, pumice, pumicite [and] cinders" are declared not to be valuable mineral deposits within the

meaning of the mining laws by sec. 3 of the Surface Resources Act of 1955, 69 Stat. 368, *as amended*, 30 U.S.C. § 611 (1970). In order for a variety of one of these materials to be classified as "uncommon," and therefore subject to location, it must meet two criteria: (1) the deposit must have a unique property; and (2) the unique property must give the deposit a distinct and special value. *United States v. Beal*, 23 IBLA 378, 395 (1976); *United States v. U.S. Minerals Development Corp.*, 75 I.D. 127 (1968).

The evidence presented by BLM that geodes are a common variety consisted entirely of testimony by the BLM mining engineer that geodes are common to the claim area (Tr. 33), that similar geodes are found in other parts of the country (Tr. 24-26), and that geodes are composed of material from the "quite common" quartz family (Tr. 48). However, the mining engineer also testified that geodes do not occur "prolifically" (Tr. 34), and he agreed that when compared to "regular stones," geodes are "somewhat unique and uncommon" (Tr. 37).

The Government's *prima facie* case that the geodes are a common variety rests only upon a comparison of this deposit with geodes from other areas. The evidence of the Government witnesses comparing the geodes with other stone formations, however, tends to show that the geodes do not occur in abundance in nature and are not widespread in their occurrence generally. This is unlike sand and gravel

December 6, 1976

deposits and many building stone deposits which are widely spread and in large abundance generally. It was such deposits that the Act of July 23, 1955, was intended to make non-locatable. The contestees' evidence emphasized the peculiar physical properties of these geodes and the special economic values attributable to those properties and to the deposits on these claims in such quantities that they assert mining operations are feasible. From the state of the record, we must conclude that the deposits of geodes, and the geodes themselves, have unique properties which give them a special and distinct value. The fact that the geodes may be similar to geodes from other areas which have similar properties and values is not sufficient alone to establish that the deposit of geodes is a common variety of stone within the meaning of the Act of July 23, 1955.

Whenever the Government contests a mining claim, it has assumed the burden of presenting a prima facie case on the charges in the complaint; the burden then falls on the mining claimant to rebut by a preponderance of the evidence such prima facie case. *United States v. Bechtold*, 25 IBLA 77, 82 (1976); *United States v. Beal*, *supra* at 393; *United States v. Taylor*, *supra*. Here BLM has not appealed the holding of Judge Mesch that no prima facie case was presented on the issue of valid discovery. We see no basis for changing that holding. The appellees preponderated on the issue of common variety. We, therefore, af-

firm the decision of Judge Mesch in dismissing the contest complaint without reaching any conclusion as to the actual validity of the mining claims.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

JOAN B. THOMPSON,  
*Administrative Judge.*

WE CONCUR:

NEWTON FRISHBERG,  
*Chief Administrative Judge.*

MARTIN RITVO,  
*Administrative Judge.*

MANLEY RUSTIN AND  
BETTY RUSTIN

28 IBLA 205

Decided December 6, 1976

Appeal from decision of Idaho State Office, Bureau of Land Management, rejecting Color of Title application I-12035.

Affirmed.

1. Color or Claim of Title: Generally—  
State Laws

Possession of federal land for the period of a state's statute of limitations, which may create title rights in an adverse possessor to nonfederal land, cannot affect the title of land belonging to the United States. Where there is no other acceptable basis for a belief that a claimant has title other than mere adverse possession under such a state

law, there is no claim or color of title recognizable under the Color of Title Act, 43 U.S.C. § 1068 (1970).

## 2. Color or Claim of Title: Generally

A claim under the Color of Title Act, 43 U.S.C. § 1068 (1970), must be based upon a deed or other document which on its face purports to convey the applicant the land applied for.

**APPEARANCES:** Ted C. Springer, Esq., Challis, Idaho, for the appellants.

### OPINION BY ADMINISTRATIVE JUDGE THOMPSON

#### INTERIOR BOARD OF LAND APPEALS

By a decision dated May 24, 1976, the Idaho State Office, Bureau of Land Management (BLM), rejected appellants' application under the Color of Title Act, 43 U.S.C. § 1068 (1970). Appellants rest their claim solely upon an allegation of good faith adverse possession with attendant improvements and cultivation. Appellants' application, submitted on BLM Form 42-R1457, states that the basis for their claim lies in the fact that,

To the best of claimants' knowledge, parcel claimed was enclosed by fence by patentee of contiguous land south of parcel in 1903, cultivated by irrigation, possessed, occupied, fenced and used since patent by patentee and his successors in interest including claimant, to the exclusion of others, until eviction by Bureau of Land Management in 1974-1975.

The application was accompanied by a copy of BLM Form 2540-2 titled "Conveyances Affecting Color or Claim of Title." That

form, completed by the Custer County Recorder, stated "no conveyances of record affecting above parcel-title vested in USA."

Appellants have not produced any instrument or deed which purports to vest them with any title to the parcel. All that appellants have shown, at most, is that they, along with their predecessors in interest, have fenced and cultivated the parcel for a period of years. Appellants argue, however, that the rule of property in the State of Idaho is that a person may acquire title to real property by claim of title not based upon a written instrument and they contend that this rule should be applied in this case.

[1] While it is correct, as appellants point out, that the federal courts usually apply the law of the state where real property is located in determining questions affecting local land titles, the case before us does not present a routine title dispute which a federal court would decide "precisely as the state courts ought to do."<sup>1</sup> Indeed, this case involves a claim which the state courts are powerless to consider. It has long been recognized that possession of federal land for the period of a state's statute of limitations, which could give rise to title rights in an adverse possessor of non-federal land, cannot affect the title of the United States. *E.g.*, *United States v. California*, 332 U.S. 19 (1947); *United States v. Gossett*, 416 F. 2d 565 (9th Cir. 1969). The Color of Title Act

<sup>1</sup> Appellant's Memorandum, p. 2.

under which appellants seek a conveyance contemplates the use of uniform federal standards to determine claims, and special state rules are thus not applicable. Under the Color of Title Act there must be a claim or color of title. Mere adverse possession alone under state law has never been considered a claim of title under the Act, because there is no basis for any belief that a claimant can acquire title against the United States under a state statute of limitations. *Cf. Beaver v. United States*, 350 F. 2d 4 (9th Cir. 1965), *cert. denied*, 383 U.S. 937 (1966), and see cases cited, *infra*.

[2] We have repeatedly held that a valid Color of Title claim cannot be made by one who does not establish that the land in issue was conveyed to him by an instrument which, on its face, purported to convey the tract in question. *E.g., Mildred A. Powers*, 27 IBLA 213 (1976); *Cloyd and Velma Mitchell*, 22 IBLA 299 (1975); *James E. Smith*, 13 IBLA 306, 80 I.D. 702 (1973); *Marcus Rudnick*, 8 IBLA 65 (1972); *S. V. Wantrup*, 5 IBLA 286 (1972). Our position on this issue, moreover, has been sustained by the federal courts in *United States v. Wharton*, 514 F. 2d 406 (9th Cir. 1975), and *Day v. Hickel*, 481 F. 2d 473 (9th Cir. 1973).

Accordingly, we find that the Idaho State Office correctly denied the appellants' Color of Title application.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of

the Interior, 43 CFR 4.1, the decision of the Idaho State Office rejecting the application is affirmed.

JOAN B. THOMPSON,  
*Administrative Judge.*

WE CONCUR:

MARTIN RITVO,  
*Administrative Judge.*

NEWTON FRISHBERG,  
*Chief Administrative Judge.*

## APPEAL OF EKLUTNA, INC.

### 1 ANCA 190

Decided December 10, 1976

Appeal from the Decision of the Alaska State Office, Bureau of Land Management #AA-6661-A, dated Aug. 29, 1975, rejecting certain land selections of Eklutna, Inc., under secs. 11 and 12 of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1624 (Supp. IV, 1974), as amended, 89 Stat. 1145 (1976).

Decision of the Bureau of Land Management reversed Dec. 10, 1976.

#### 1. Title: Generally

In public land law, the term "equitable title" is used to describe the interest held by an entryman who, upon full compliance with requirements of the law, has rights in the land superior to all other claims, and is entitled to issuance of patent by the Federal government, which holds only legal title to the land.

#### 2. Applications and Entries: Vested Rights

The holder of equitable title has a vested interest; *i.e.*, that interest, acquired by a

party when all prerequisites for the acquisition of title have been complied with, attaching to the land, deprives Congress of its power to dispose of the property.

### 3. Alaska Native Claims Settlement Act: Aboriginal Claims

In express provisions of the Treaty of Cession and the Organic Act of 1884, and through disclaimers in the Statehood Act, aboriginal title in Alaska received statutory protection in addition to that normally extended on the basis of Native occupancy.

### 4. Alaska Native Claims Settlement Act: Aboriginal Claims

Until Congress acted to extinguish rights of Alaskan Natives to use and occupancy of aboriginal lands, such rights remained as an encumbrance on the fee, and title to land claimed by Alaska Natives, to which use and occupancy might be proved, was void when given.

### 5. Alaska Native Claims Settlement Act: Aboriginal Claims—Alaska Native Claims Settlement Act: Land Selections: State Interests: Statehood Act Selections: Tentative Approvals

Prior to ANCSA, the State's interest in its tentatively approved selections was subject to divestment upon proof of Native use and occupancy, and was subject to Congressional resolution of such claims. Unadjudicated claims of aboriginal title remained the only impediment to selection of such lands.

### 6. Alaska Native Claims Settlement Act: Aboriginal Claims—Alaska Native Claims Settlement Act: Withdrawals: Generally—Alaska Native Claims Settlement Act: Land Selections: State Interests: Statehood Act Selections: Tentative Approvals

The express terms of secs. 11 and 12 of ANCSA make lands previously TA'd to the State of Alaska available for selec-

tion by qualified Native Corporations, indicating the conclusion of Congress that such lands were subject to disposal in settlement of Native claims.

### 7. Alaska Native Claims Settlement Act: Land Selections: Village Selections—Alaska Native Claims Settlement Act: Land Selections: State Interests: Statehood Act Selections: Tentative Approvals

ANCSA provides in secs. 11(a) (2) and 12(a) (1) that each village may select up to 69,120 acres of its total entitlement from TA'd lands within the area, usually 25 townships, surrounding the village. Such State TA's, already encumbered by aboriginal title to lands on which use and occupancy could be proved, were now subject to a statutory prior right of selection by village corporations; a Native right of selection, based not on aboriginal title, but on Congressional grant in ANCSA.

### 8. Alaska Native Claims Settlement Act: Aboriginal Claims—Alaska Native Claims Settlement Act: Land Selections: State Interests: Statehood Act Selections: Tentative Approvals

The retroactive extinguishment of aboriginal title, and the resulting validation of State title, mandated by sec. 4(a) of ANCSA, applies to those lands tentatively approved to the State which are located outside Native village withdrawal areas.

### 9. Alaska Native Claims Settlement Act: Aboriginal Claims—Alaska Native Claims Settlement Act: Land Selections: State Interests: Statehood Act Selections: Tentative Approvals

Extinguishment of aboriginal title did not vest the State's title to those TA'd lands located within sec. 11(a) (2) withdrawal areas, for Congress clearly conferred on Native village corporations a superior right to select up to 69,120 acres of such lands.

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**10. Alaska Native Claims Settlement Act: Withdrawals: Generally—Alaska Native Claims Settlement Act: Land Selections: State Interests: Statehood Act Selections: Tentative Approvals**

The State's interest in TA'd lands located within sec. 11(a)(2) withdrawal areas did not vest prior to ANCSA, and did not vest subsequent to ANCSA as to lands properly selected by village corporations within the three-year period mandated by sec. 12(a).

**11. Alaska Native Claims Settlement Act: Withdrawals: Generally—Alaska Native Claims Settlement Act: Land Selections: State Interests: Statehood Act Selections: Tentative Approvals**

The State's interest vests in those TA'd lands within sec. 11(a)(2) withdrawals not selected by village corporations within statutory deadlines, for, upon completion of Native selections, the last encumbrance on the State's title is removed.

**12. Alaska Native Claims Settlement Act: Withdrawals: Generally—Alaska Native Claims Settlement Act: Land Selections: State Interests: Statehood Act Selections: Tentative Approvals**

In withdrawing lands around villages tentatively approved to the State, Congress rejected the State's contention that tentative approval vested title in the State, and in consequence rejected the title the State had relied upon to dispose of TA'd lands to third parties.

**13. Alaska Native Claims Settlement Act: Land Selections: State Interests: Generally—Alaska Native Claims Settlement Act: Land Selections: Third-Party Interests**

The Municipality, as grantee of the State, could not acquire greater interests than its grantor and could not, prior to ANCSA, acquire equitable title; accord-

ingly, any protection or priority afforded the Municipality must be statutory, conferred by ANCSA.

**14. Alaska Native Claims Settlement Act: Land Selections: State Interests: Generally—Alaska Native Claims Settlement Act: Land Selections: Third-Party Interests**

The Municipality is organized and may be dissolved under State law and presently has the power to exercise governmental functions including the acquisition, management, and disposal of land independent of control by the State. Until revoked or modified by constitutional or legislative amendment, such powers remain in force and render the Municipality an entity separate from the State for purposes of holding third-party interests under ANCSA.

**15. Alaska Native Claims Settlement Act: Land Selections: State Interests: Generally—Alaska Native Claims Settlement Act: Land Selections: Third-Party Interests**

Because the State was not prohibited by §6(g) of the Statehood Act from granting tentatively approved lands to local governments, and neither the Statehood Act nor selection procedures in A.S. 29.18.190 require payment of consideration, the Municipality's interest in the disputed lands does not fail for lack of consideration.

**16. Alaska Native Claims Settlement Act: Land Selections: Village Selections**

Eklutna, Inc., is not estopped from selecting the disputed lands by Resolutions 68-9 and 68-10 of the Eklutna Village Council because there is no evidence of any identity of interest or membership between the Council, an unincorporated community association, and Eklutna, Inc., nor is there any indication that the Eklutna Village Council was authorized to bind the Natives of Palmer.

# **17. Alaska Native Claims Settlement Act: Land Selections: Entrymen**

Sec. 22(b) is specific and unambiguous, reflecting the concern of Congress for a class of persons carefully described: *i.e.*, entrymen under the Federal public land laws governing homesteads, headquarters sites, trade and manufacturing sites, and small tract sites.

# **18. Alaska Native Claims Settlement Act: Land Selections: Third-Party Interests—Alaska Native Claims Settlement Act: Land Selections: Entrymen**

Sec. 22(b) of ANCSA is not applicable to, and does not protect, the Municipality because having an interest created by the State of Alaska under State law, it is not an entryman under Federal public land laws leading to acquisition of title to homesteads, headquarters sites, trade and manufacturing sites, or small tract sites.

# **19. Alaska Native Claims Settlement Act: Withdrawals: Generally—Alaska Native Claims Settlement Act: Land Selections: State Interests: Statehood Act Selections: Tentative Approvals—Alaska Native Claims Settlement Act: Land Selections: Third-Party Interests—Alaska Native Claims Settlement Act: Land Selections: Valid Existing Rights**

Secs. 11(a)(1) and 11(a)(2) of ANCSA direct withdrawals for village selections to be made subject to valid existing rights. The withdrawal of State TA'd lands in sec. 11(a)(2) impliedly recognizes the existence of third-party interests created by the State prior to ANCSA, by prohibiting the creation of such interests subsequent to the withdrawal.

# **20. Alaska Native Claims Settlement Act: Land Selections: Valid Existing**

# **Rights—Alaska Native Claims Settlement Act: Land Selections: Entrymen**

ANCSA protects as "valid existing rights," those rights, whether derived from the State or Federal government, which do not lead to a grant of fee title and which were created prior to enactment of ANCSA. Rights leading to a fee, which had vested prior to enactment, would not be subject to Congressional disposal and would be excluded from withdrawals for Native selection. Rights of entrymen leading to grant of a fee under Federal public land laws, which had not vested prior to enactment of ANCSA, are treated by ANCSA as if vesting had occurred and are not categorized as "valid existing rights."

# **21. Alaska Native Claims Settlement Act: Land Selections: Valid Existing Rights—Alaska Native Claims Settlement Act: Land Selections: Entrymen**

The interests described in sec. 14(g) of ANCSA are of a temporary or limited nature, in contrast to those derived from laws leading to a grant of fee title such as the entries protected in sec. 22(b), and, therefore, are not incompatible with Native fee ownership of the land.

# **22. Alaska Native Claims Settlement Act: Land Selections: Third-Party Interests—Alaska Native Claims Settlement Act: Land Selections: Entrymen**

The Municipality is not protected under sec. 14(g) of ANCSA because its interest leads to grant of fee title by the State, if the State were able to issue patent; such an interest is incompatible with conveyance to a Native grantee as contemplated by sec. 14(g).

# **23. Alaska Native Claims Settlement Act: Land Selections: Village Selections—Alaska Native Claims Settlement Act: Land Selections: Third-Party Interests—Alaska Native Claims**

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**Settlement Act: Conveyances: Reconveyances**

Municipal corporations, organized to provide necessary government services, are beneficiaries of sec. 14(c) of ANCSA in that they received title to lands they use and occupy, and to additional lands for community expansion.

**24. Alaska Native Claims Settlement Act: Land Selections: Village Selections—Alaska Native Claims Settlement Act: Land Selections: Third-Party Interests—Alaska Native Claims Settlement Act: Conveyances: Reconveyances**

The Municipality's interest in lands improved for recognized public purposes is protected by sec. 14(c)(3) of ANCSA because the Municipality occupies the same position with regard to Eklutna as the local government entities envisioned by Congress in enacting such reconveyance provision and the disputed land, while outside Eklutna Village, is within the village withdrawal area and has been improved for a public purpose.

**APPEARANCES:** Edward G. Burton, Esq., and Ralph E. Duerre, Esq., for Eklutna, Inc.; John W. Burke, Esq., for the State Director, Bureau of Land Management; James Vollintine, Esq., and John R. Snodgrass, Esq., for Cook Inlet Region, Inc.; Richard W. Garnett, Esq., and Thomas E. Meacham, Esq., for the Municipality of Anchorage; and James N. Reeves, Esq., for the State of Alaska.

*OPINION BY CHAIRMAN  
BRADY*

*ALASKA NATIVE CLAIMS  
APPEAL BOARD*

**JURISDICTION**

The Alaska Native Claims Appeal Board, pursuant to delegation of authority in the Alaska Native Claims Settlement Act, 43 U.S.C. §§1601-1624 (Supp. IV, 1974), *as amended*, 80 Stat. 1145 (1976), and the implementing regulations in 43 CFR Part 2650, *as amended*, 40 FR 14734 (Apr. 7, 1976), and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and Decision reversing the Decision of the Alaska State Director, Bureau of Land Management #AA-6661-A (hereinafter the State Director).

Pursuant to the regulations in 43 CFR Part 2650, *as amended*, and Part 4, Subpart J, the State Director is the officer of the United States Department of Interior who is authorized to make decisions on land selection applications involving Native Corporations under the Alaska Native Claims Settlement Act, subject to appeal to this Board.

**FACTUAL BACKGROUND**

The lands in dispute were selected in 1965 by the State of Alaska pursuant to sec. 6(b) of the Alaska Statehood Act, 72 Stat. 339, *amended*, 48 U.S.C. ch. 2 (1970) (hereinafter "the Statehood Act"). Subsequent to the filing of Native Protest #AA-368 with the Bureau of Land Management in 1966, the lands were tentatively approved but not patented to the State. The lands are located within the boundaries of the Municipality of Anchorage, previously the Greater Anchorage Area Borough, and

were made available by the State to the Borough for selection pursuant to Alaska Statute sec. 29.18.190, which permits a borough to select up to 10 percent of the vacant, unappropriated, unreserved State land within its boundaries. The borough selected the lands in 1968 and the State on Apr. 11, 1969, tentatively approved the selection under procedures, outlined in Alaska Statute sec. 29.19.200, which parallel selection procedures followed by the State of Alaska pursuant to sec. 6(g) of the Alaska Statehood Act. In connection with its land selection and the State's tentative approval, the borough solicited and received the approval and consent of the Eklutna Village Council, expressed in two documents entitled Resolution No. 68-9 and Resolution No. 68-10, executed in Oct. 1968:

The initial resolution, designated Resolution #68-9 read as follows:

WHEREAS, the Native Village of Eklutna has filed a claim and protest concerning certain lands in the State of Alaska, which claim is identified as Native Protest AA-368 in the Bureau of Land Management records, and

WHEREAS, it has come to the attention of the Village Council that the Greater Anchorage Area Borough is desirous of obtaining title to certain lands in the Chugiak area in order to vest in itself title to the site of the Chugiak High School and the surrounding parcel of land for school purposes, and for the construction of a new school, and

WHEREAS, it is not the intention of the Native Village of Eklutna to withhold the granting of clearances on lands which are to be made available for public use and benefit, and most particularly in matters of public education;

NOW, THEREFORE, BE IT RESOLVED, that the Native Village of Eklutna hereby withdraws its objection to the selection by the Greater Anchorage Area Borough of the following described parcels of land in the claimed area to be used for school purposes:

Lots Five (5), Six (6) and Seven (7) of the Southeast One-quarter ( $SE\frac{1}{4}$ ) of the Northwest One-quarter ( $NW\frac{1}{4}$ ) of the East One-half ( $E\frac{1}{2}$ ), of the Southwest One-quarter ( $SW\frac{1}{4}$ ) of Section 19, Township 15 North, Range 1 West, Seward Meridian.

BE IT FURTHER RESOLVED that such consent to the selection of the above described lands by the Greater Anchorage Area Borough is given without prejudice to the rights of any of the Native people of Alaska to be compensated for such lands.

The second Resolution No. 68-10, corrected the land description to read:

Lots Five (5), Six (6) and Seven (7) in Section Nineteen (19), and that portion of the East One-half ( $E\frac{1}{2}$ ) of the Southwest One-Quarter ( $SW\frac{1}{4}$ ) of Section Nineteen (19) lying westerly of the relocated Glenn Highway right-of-way; all of which lands are located in Township 15 North, Range 1 West, Seward Meridian, containing 138.33 acres more or less.

The Borough then constructed upon the land a public high school, elementary school, and associated facilities which have been in operation since their completion.

Subsequent to these events, the settlement at Eklutna was certified eligible for benefits and incorporated as a Native Village pursuant to ANCSA, and, under sec. 11(a) of ANCSA, the Bureau of Land Management withdrew certain lands in the townships surrounding the village for selection by the Village Corporation, Eklutna, Inc.

*December 10, 1976*

Included in the withdrawal, and selected by Eklutna, Inc., are the lands on which the public school facilities are located. Thus arose the conflict leading to this appeal. The Greater Anchorage Area Borough has subsequently merged with the City of Anchorage and the resulting unified government, called the Municipality of Anchorage, now exercised all powers and succeeds to all responsibilities of the predecessor Borough. The term "the Municipality" will be used herein to refer to both the former Greater Anchorage Area Borough and the present unified government.

#### PROCEDURAL BACKGROUND

On Aug. 29, 1975, the State Director, Bureau of Land Management issued a Decision rejecting in part village selection AA-6661-A of Eklutna, Inc., for lands described as Lots 5, 6, and 7, and E $\frac{1}{2}$  SW $\frac{1}{4}$  of Sec. 19, T. 15, N., R. 1 W., Seward Meridian. The Decision notified Eklutna, Inc., of its appeal rights and stated that if an appeal was taken, the adverse parties to be notified were the Greater Anchorage Area Borough and the State of Alaska. Eklutna, Inc., timely appealed, serving copies of its Notice of Appeal on the Municipality and the State Division of Lands as directed. In an Order dated Oct. 24, 1975, the Board designated necessary parties as follows: State of Alaska; State Director, Bureau of Land Management; Eklutna, Inc.; Cook Inlet Region

Inc.; and the Municipality of Anchorage.

Various parties in motions filed throughout the course of the appeal have requested the Board to extend the time in which documents could be filed, to accept additional briefs, to hold a prehearing conference, and to hear oral argument. All motions have been granted or denied with the exception of the motion of the Municipality of Anchorage for oral argument, which is hereby denied because the issues have been briefed voluminously and oral argument would not be of significant assistance in deciding the appeal.

On Mar. 26, 1976, the Board, in an Order scheduling a conference outlined the issues presented by the appeal which are listed in the summary of parties' responses to issues, herein.

A conference, held Apr. 29, 1976, and attended by all parties, resulted in the following stipulations:

1. The lands which are the subject of this appeal are lots 5, 6, and 7, and that portion of the E $\frac{1}{2}$  SW $\frac{1}{4}$  west of the relocated Glenn Highway right-of-way in Sec. 19, T. 15 N., R. 1 W., Seward Meridian; the exact acreage of such lands is not relevant to this appeal.

2. No municipal corporation organized under the laws of Alaska known as Eklutna, or having as its population center the settlement at Eklutna, is located within the disputed lands but the said settlement at Eklutna and the lands which are the subject of this appeal are located within the boundaries of the Municipality of Anchorage.

It was further agreed that Eklutna, Inc., and the Municipality of Anchorage would file additional ma-

materials within 30 days from the date of the Order summarizing the conference, and that all parties would then have an additional 30 days in which to file any response desired to such materials.

On Apr. 7, 1976, regulations requiring the Bureau of Land Management to publish decisions to convey lands were published in the Federal Register (Title 43, Ch. II, Part 2650, Sec. 2650.7, 41 FR 14737 (1976)). On May 26, 1976, the Board issued an Order requiring the Bureau of Land Management, consistent with this regulation, to publish certain proposed decisions from which appeals currently before the Board had been filed. However, the Board deemed the record closed on certain appeals filed substantially before promulgation of these regulations, including the present appeal, and did not require publication of the decisions appealed from in these cases.

Accordingly, the record before the Board consists of the BLM appeal files, Notice of Appeal, all documents filed by all parties subsequently, and the Board's Orders relevant to the appeal.

### STATUTORY AND REGULATORY PROVISIONS

Of particular relevance to the appeal are the following statutory and regulatory provisions, quoted in the Appendix hereto:

1. Treaty of Cession, Mar. 30, 1867, Art. III, 15 Stat. 539, 542.

2. Organic Act of May 17, 1884, sec. 8, 23 Stat. 24, 26.

3. Alaska Statehood Act, July 7, 1958, 72 Stat. 339, sec. 4, 6(b) and 6(g).

4. Alaska Native Claims Settlement Act, 43 U.S.C. §§1601-1624 (Supp. IV, 1974), *as amended*, 89 Stat. 1145, secs. 3(e), 4, 11(a)(1), 11(a)(2), 14(c), 14(g) and 22(b).

5. Regulations contained in 43 CFR 2650.3-1, 43 CFR 2650.5-4, and 43 CFR 2651.4.

### DISCUSSION OF ISSUES

The basic question for decision is whether lands selected by the Municipality from lands tentatively approved to the State are available for selection by Eklutna, Inc. Resolution of this question requires consideration of subordinate issues, raised and briefed by the parties and listed in the order of Mar. 26, 1976. These issues are addressed for purposes of this Decision in a slightly different sequence than that followed by the parties in response to the Order; each party's responses to the issues as listed are summarized as follows for the record.

### SUMMARY OF PARTIES' RESPONSES TO ISSUES OUTLINED BY BOARD

1. *Whether, upon tentative approval of State land selections under the Statehood Act, the State of Alaska acquired a present interest in such lands in the nature of equitable title?*

The Municipality contends that equitable title vested in the State

upon identification of lands for selection pursuant to sec. 6(g) of the Statehood Act, and that third-party interests derived from the State's equitable title prior to passage of ANCSA cannot be divested by the State's subsequent voluntary relinquishment.

Cook Inlet Region argues that neither selection of land by the State, nor tentative approval of such selections, vests in the State any present interest or equitable title which would entitle the State to issuance of patent as a ministerial act. Cook Inlet contends that even after tentative approval, the Secretary has the duty to inquire into the validity of the conveyance, and intervening factors may prevent vesting; here, an intervening factor was the assertion of Native claims. Pointing out that the lands were the subject of Native Protest #AA-368, filed before tentative approval, Cook Inlet cites *Alaska v. Udall*, 420 F. 2d 938 (9th Cir. 1969), *cert. denied*, 397 U.S. 1067 (1970) and *Edwardsen v. Morton*, 369 F. Supp. 1359 (D.D.C. 1973), for the proposition that tentative approval was void when given. Cook Inlet argues that, because of the Native protests, the land could not have been considered "vacant, unappropriated, and unreserved" as required for selection.

2. *Whether such interest in the State, if any, was affected by ANCSA?*

The Municipality contends that the lands in which the State had

such an interest were not "public lands" as defined in sec. 3(e) of ANCSA. The remaining parties discussed this question in connection with other issues.

3. *Whether the Municipality is an entity legally capable of itself constituting a third party whose interest in the disputed lands is protected as a valid existing right under ANCSA, or whether the Municipality is so indistinguishably identified with the State of Alaska as to preclude such a result?*

Eklutna and Cook Inlet Region argue that the Municipality is an instrumentality of the State which acts as the State's "alter ego" in the selection process; and that such political subdivisions of the State were not intended by Congress to impede Native selections. Eklutna further argues that the only parties holding valid existing rights protected by ANCSA are those holding leases or contracts with the State.

The Municipality replies that it is a public corporation with the powers to exercise governmental and proprietary functions which remain in force until revoked or modified by legislation or constitutional amendment. The Municipality claims autonomous powers to acquire, manage, and dispose of land, independent of State control. It denies any part in the State selection process in that, under sec. 6(g) of the Statehood Act, the State may not delegate its selection rights, and the State has consistently rejected

Borough selections of State lands prior to the State's receipt of tentative approval.

4. *Whether the State, by approval of a selection by the Municipality of lands tentatively approved to the State, or by conveyance of such lands by other procedures, created in the Municipality a valid existing right?*

The Municipality contends that the prohibition in sec. 11(a)(2) on creation of future third-party interests by the State does not affect the validity of such interests created previously, and the State cannot waive third-party rights created prior to ANCSA. Eklutna asserts, to the contrary, that the State's approval of the Borough land selection did not create a valid existing right because approval was conditional on the State's receiving title, and the State's right to title was extinguished by ANCSA as was aboriginal title. Eklutna contends that ANCSA protects only those interests enumerated in sec. 14(g) of ANCSA; that the Municipality's interest does not arise from a lease or contract so protected and that if it did, Eklutna would receive conveyance of the lands, succeeding to the State's interest as lessor/contractor. Eklutna distinguishes the facts in *State of Alaska*, 19 IBLA 178 (1975) from those in the present appeal because in the former case a patent had issued to a borough with the approval of Native groups, while under the present circumstances the State, having received tentative approval,

approved the Municipality's selection but did not issue patent.

The Municipality responds that the State, by approving the Borough's selection, entered into an executory contract to convey the land pursuant to A.S. 29.18.190-200. It is the Municipality's position that all the circumstances of the school-site acquisition (tentative approval of the State selection, State approval of the Municipality's selection in conjunction with the consenting resolution of the Eklutna Village Council, and construction in reliance of such approvals and consent) created in the Municipality a valid existing right within the non-exclusive enumeration of rights in sec. 14(g) of ANCSA, or, alternatively, a contract right.

Cook Inlet asserts that the State never received a vested interest in the lands and could not convey one to the Municipality. The State's right to title was merely conditional as recognized in 11 AAC 54.480, State regulations providing for cancellation of conditional sale contracts on lands selected under Federal grants, if the State does not receive title. Cook Inlet argues that the only interests which the State was legally authorized to create in lands tentatively approved under sec. 6(g) of the Statehood Act were conditional leases and conditional sales; that only leases survived withdrawal under sec. 11(a) of ANCSA because of specific mention in sec. 14(g); and that the only interests protected by sec. 22 (b) of ANCSA are those derived from the entries listed therein:

homesteads, headquarters sites, trade and manufacture sites, and small tracts. Eklutna also challenges the Municipality's selection on procedural grounds, because the State failed to establish formal selection procedures as required by law, and because an ordinance of the Greater Anchorage Area Borough required the Borough Assembly to authorize by resolution the acquisition of land under grant programs in which the acreage was limited, and there is no evidence that a resolution was voted.

5. *Whether the interest so acquired, if any, of the Municipality must be supported by valuable consideration to constitute such a valid existing right?*

The Municipality argues variously that assumption of local government powers is in itself sufficient consideration for a land grant; that each such selection diminishes the Borough's remaining entitlement to a total of ten percent of the State lands within its boundaries and thereby constitutes consideration under a theory of legal detriment incurred; that State statutes permit land grants without consideration as has traditionally been the case with grants from the sovereign; that the Municipality's expenditure of public funds on construction of school facilities, in reliance on the State's approval and the consent of the Eklutna Village Council offset the need for consideration; and that Native groups having failed to protest during construction of the

school facilities, are estopped to do so now. Eklutna and Cook Inlet Region respond that the Borough's assumption of a duty owed, *i.e.*, that exercise of local government power, is not consideration and in any event was not bargained for; that receipt of a part of the land granted to the Borough by the State is not consideration for the grant; and that the State was empowered under sec. 6(g) of the Alaska Statehood Act to make only conditional sales and conditional leases, both transactions requiring consideration, and that any State grant of lands to the Borough was void under sec. 6(g) because it was a grant extended without consideration.

6. *Whether Eklutna, Inc., is precluded from selection of the lands in dispute by the execution by the Eklutna Village Council of Resolutions 68-9 and 68-10?*

The Municipality takes the position that Eklutna, as a result of the execution of such resolutions, is now estopped to select the land and sites, State of Alaska, *supra*, for the proposition that conditional patent with approval of a concerned Native group passes title. Eklutna and Cook Inlet answered that while the Village Council may have consented to the Borough's selection of the lands for school purposes, they reserve the right to compensation in the future and that such compensation, under ANCSA, includes the right to incorporate and select such lands. Eklutna further argues that the Eklutna Village Council was a

volunteer organization without legal status which had no authority to waive the claims or rights of the shareholders of Eklutna, Inc., a Village Corporation organized under ANCSA. Eklutna notes that the settlement or Village of Eklutna has at no time been organized as a reservation, municipal corporation, or any other legal entity and that the Eklutna Village Council was merely a committee which unsuccessfully sought legal status for itself and for its village but which never successfully achieved it prior to the enactment of ANCSA and recognition of Eklutna as a Native Village under the Act.

7. *Whether Eklutna, Inc., upon receipt of patent to the lands in dispute in the subject appeal will be required to reconvey such lands to the Municipality, or to the State in trust for such other Municipal government as may be established in the future within the boundaries of the Native village of Eklutna, pursuant to sec. 14(c) (3) of ANCSA?*

The Municipality argues that it will not, pointing out that the lands are not in physical proximity to the village site. Eklutna, on the other hand, argues that such a reconveyance is required and that this construction of sec. 14(c) (3) of ANCSA is necessary so as not to prejudice Alaska Natives. Cook Inlet Region, contrary to Eklutna's position, contends that the reconveyance provisions do not apply because the Municipality of Anchorage is not "in" the Village of Ek-

lutna and State law (A.S. 44.47.150 (1975)) as well as ANCSA provide for conveyance to the State in trust for any Municipal government organized in the future "in" the village. Cook Inlet contends that the Borough was considered to be so identified with the State that its interest must fail with the State's TA under ANCSA. Cook Inlet further argues strongly that since all the provisions of ANCSA regarding protection of valid existing rights appear to be ambiguous as applied to boroughs and in this case to the Municipality of Anchorage, such ambiguity must be construed in favor of the Natives.

## ANALYSIS

In order to decide whether lands selected by the Municipality from lands tentatively approved, but not yet patented, to the State are available for selection by Eklutna, Inc., it must first be determined whether the State upon tentative approval acquired equitable title to such lands.

[1] In public land law, the term "equitable title" is generally used to describe the interest held by an entryman who, upon full compliance with requirements of the law, has rights in the land superior to all other claims, and is entitled to issuance of patent by the Federal government, which holds only legal title to the land. Describing such a right to issuance of patent, the Court in *Armstrong v. Udall*, 435 F. 2d 38 (9th Cir. 1970) stated:

Where [a] claimant to public land has done all that is required to perfect his

claim \* \* \* and validity of his title may no longer be questioned, there is a plain duty on part of government official to act and mandamus will lie to compel that action. \* \* \*

[2] The holder of equitable title has a vested interest; *i.e.*, that interest, acquired by a party when all prerequisites for the acquisition of title have been complied with, which, attaching to the land, deprives Congress of its power to dispose of the property. (*Shepley v. Cowan*, 91 U.S. 424, 23 L. Ed. 424 (1875)). Such vesting of title is considered a disposal of the land; *i.e.*, “\* \* \* that final and irrevocable act by which the right of a person, purchaser, or grantee, attaches, and the equitable right becomes complete to receive the legal title by a patent or other appropriate mode of transfer.” \* \* \* (*Assiniboine and Sioux Tribes v. Nordwick*, 378 F. 2d 426, 429 (9th Cir., 1967)).

Thus, the assertion that equitable title vested in the State upon tentative approval of a land selection would be completely inconsistent with the withdrawal for Native selection, in sec. 11(a)(2) of ANCSA, of lands “that have been selected by, or tentatively approved to, but not yet patented to, the State \* \* \*,” for the vesting of title would deprive Congress of the power to dispose of the lands for any purpose, including the settlement of Native claims.

As in the case of individual entrymen, a State's title vests and the State is deemed to hold equitable title when all requirements for acquisition of the land have been

performed, save for ministerial acts by the Federal government. In some cases, where the State had no right to select particular lands, but simply received school grant sections designated by number, title was held not to vest until final survey was completed and approved. *United States v. Wyoming*, 331 U.S. 440, 91 L. Ed. 1590 (1947.)

Where the State or other grantee exercised the right to select particular lieu lands, granted in exchange for lands to which the State had held title, the State's title was held to vest upon selection, and survey was treated as a mere ministerial act. (*Payne v. New Mexico*, 255 U.S. 367, 65 L. Ed. 680 (1921); *Payne v. Central Pac. Ry. Co.*, 255 U.S. 228, 65 L. Ed. 598 (1921); *Wyoming v. United States*, 255 U.S. 489, 65 L. Ed. 742 (1921)). See also *Appeal of Seldovia Native Association*, 1 ANCAB 65, 83 I.D. 461 (1976).

The State of Alaska's claim to the lands in dispute arises under the Alaska Statehood Act, which grants to the State the right to select approximately one hundred and three million acres of “vacant, unappropriated, and unreserved” land. (72 Stat. 339, 340, secs. 6(a) and 6(b)). (See Appendix A, p. 660.) The Statehood Act in sec. 6(g) authorized the State to execute conditional leases and sales of selected lands, after tentative approval by the Secretary of the Interior but before issuance of patent. (72 Stat. 339, 342.) (See Appendix A, *supra*.) The nature of the State's interest in such lands is

crucial to the present appeal. The Statehood Act was enacted against a backdrop of the Native presence in Alaska.

[3] In express provisions of the Treaty of Cession and the Organic Act of 1884, and through disclaimers in the Statehood Act, aboriginal title in Alaska received statutory protection in addition to that normally extended on the basis of Native occupancy.

The Treaty of Cession, 15 Stat. 539, 542 (1867) provided in Art. III:

*Rights of inhabitants of the ceded territory.*

The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion. The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.

The Organic Act of May 17, 1884, 23 Stat. 24, 26 provided in sec. 8:

\* \* \* That the Indians \* \* \* shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such land is reserved for future legislation by Congress: \* \* \*

The Alaska Statehood Act July 7, 1958 (72 Stat. 339) further provides in sec. 4 (quoted in full in the Appendix hereto):

As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, \* \* \* the right or title to which may be held by any Indians, Eskimos, or Aleuts \* \* \* or is held by the United States in trust for said natives; that all such lands \* \* \* [the right or title to which may be held by said natives or is held by the United States in trust for said natives], shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, \* \* \*

The Courts have recognized aboriginal title in Alaska. In *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 99 L. Ed. 314 (1955), the Court held that while Indian title unaided by statute was not a compensable right protected by due process against the United States, the historical policy of Congress had been to extinguish Native title through negotiation, not force, and Indians had a right of occupancy which the sovereign would protect against intrusion by third parties. Considering Indian rights of occupancy, the Court in *Heckman v. Sutton* construed the Organic Act of 1884 as a statutory recognition that Native possessory rights were sufficient to ground a suit against third parties for encroachment. (*Heckman v. Sutton* 119 F. 83, 89 (1902)). *Alaska v. Udall, supra*, held that an Indian protest against lands selected by the State of Alaska could not be denied without adjudication of a claim of use and occupancy; accordingly the State's right to compel issuance of patent for lands tentatively approved, and

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issuance of tentative approval for lands selected, under the Alaska Statehood Act failed pending such adjudication. In *Edwardsen v. Morton*, 369 F. Supp. 1359, 1375 (D.D.C. 1973). the Court stated:

\* \* \* \* \*

To summarize, the Statehood Act, read as a whole and read in the light of a legislative history showing an intent on the part of Congress to avoid any prejudice to Native possessory rights until such time as Congress should determine how to deal with them, did not authorize the State to select lands in which Natives could prove aboriginal rights based on use and occupancy. Accordingly, tentative approvals by the Secretary of Interior of land selections in which such rights can be proven were void at the time they were granted. \* \* \*

[4] The Board concludes that, until Congress acted to extinguish rights of Alaskan Natives to use and occupancy of aboriginal lands, such rights remained as an encumbrance on the fee, and title to land claimed by Alaska Natives, to which use and occupancy might be proved, was void when given.

The record shows that the State selected the lands in question in 1965. In 1966, Mr. George Ondola, Chairman of the Native Village of Eklutna, protested the State's selection. He claimed that the lands were in an Indian reservation and in a claim filed by the Palmer Indians before the Indian Claims Commission. He stated, " \* \* \* the Eklutna Indians have inhabited the area which the State wishes to select \* \* \* and this area has been used by the Eklutna Indians since time immemorial and the Eklutna

people hereby assert that any patent issued to the State of Alaska would be contrary to their prior subsisting right \* \* \* " (Native Protest #AA-368; see also Hearings on H.R. 13142 and H.R. 10193 before the Subcom. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 91st Cong. 1st Sess., Ser. #91-8, p. 94, Bureau of Land Management Protest Map (1969)). The referenced claim of the Natives of Palmer, based on continuous prior use and occupancy and possessory rights, was filed with the Indian Claims Commission in 1951. (Hearings on S. 35 and S. 835 before the Senate Comm. on Interior and Insular Affairs, 92d Cong. 2d Sess. p. 162 (1971), Submission of Jerome Kuykendall, Chairman.))

This claim was not adjudicated but was dismissed upon enactment of ANCSA. It appears that Resolutions 68-9 and 69-10, signed by Mr. George Ondola, purported to waive Eklutna's Protest #AA-368 as to the lands in dispute. There is no evidence in the record indicating such a waiver by the Natives of Palmer, nor is there any indication that the Natives of Palmer and the Eklutna Indians were one and the same group.

Pending adjudication of the claims of the Natives of Palmer and the Eklutna Indians, the lands in question could not have been considered "vacant, unappropriated and unreserved," as required by sec. 6(b) of the Statehood Act so as to be available for State selection

within the doctrine of *Alaska v. Udall, supra*, and tentative approvals of State selections of such lands under the finding in *Edwardson v. Morton, supra*, would have been void when given.

[5] Prior to ANCSA, the State's interest in its tentatively approved selections was subject to divestment upon proof of Native use and occupancy, and was subject to Congressional resolution and extinguishment of Native claims; unadjudicated claims of aboriginal title remained "the only impediment to selection of the lands." (*Edwardson v. Morton, supra*, at 1377.)

The Board finds that the State did not upon tentative approval of land selections under the Alaska Statehood Act, prior to ANCSA, acquire equitable title in such lands.

### LEGISLATIVE HISTORY

[6] The express terms of secs. 11 and 12 of ANCSA make lands previously TA'd to the State of Alaska available for selection by qualified Native Corporations, indicating the conclusion of Congress that such lands were subject to disposal in settlement of Native claims. A review of the legislative history of ANCSA, however, is essential to understanding the awareness of Congress regarding the impact of such selections and resulting problems. Such a review leads the Board to several broad observations on the understanding and intent of Congress regarding the State's title to lands selected under the Statehood Act. First, Congress had rec-

ognized legal uncertainties arising from aboriginal title during consideration and passage of the Statehood Act, and understood that the problem of unextinguished Native claims remained to be resolved after Alaska's admission. Second, Congress was aware, during deliberations on ANCSA, of conflicts between the State's tentatively approved selections under the Statehood Act, and Native selection rights contemplated as part compensation for extinguishment of Indian title. Third, despite argument to the contrary by the State, Congress treated title to lands tentatively approved to the State under the Statehood Act remained sufficiently within Federal control that disposition of such lands in settlement of Native claims lay within the power of Congress. And fourth, in exercising this power, Congress sought a reasonable compromise between needs of the State, Alaska Natives, and third parties.

The Alaska Native Claims Settlement Act evolved from a series of bills, variously sponsored and supported, on which committees of the House and Senate heard extensive testimony over a long period of time. Witnesses included Native leaders appearing for the Alaska Federation of Natives and regional associations and their counsel; two Alaska governors and members of their administrations; Secretary Walter Hickel and his successor, Secretary Rogers C. B. Morton and members of their staffs; representatives of other Federal agencies, oil and mining interests, conservation

groups, and private individuals with varying concerns.

Significant among the bills considered were H.R. 10193, 91st Cong., 1st Sess. (1969), recommended by the Federal Field Committee, and H.R. 13142, 91st Cong., 1st Sess. (1969), the Department of the Interior's response, introduced during the 91st Congress. In the House during the 92d Congress, Representative Wayne Aspinall introduced H.R. 3100, 92d Cong., 1st Sess. (1971); Representative Lloyd Meeds sponsored H.R. 7039, 92d Cong., 1st Sess. (1971), based on proposals of the Alaska Federation of Natives; Representative John Saylor introduced the Department of the Interior's proposals as H.R. 7432, 92d Cong., 1st Sess. (1971); and Representative Aspinall introduced H.R. 10367, 92d Cong., 1st Sess. (1971), which, amended, was reported out to the House-Senate conference committee in Sept. of 1971.

In the Senate, the Federal Field Committee's bill, companion to H.R. 10193, was introduced as S. 1830, 91st Cong., 1st Sess. (1969). In 1971, Senator Jackson introduced S. 35, 92d Cong., 1st Sess. (1971); Senator Harris introduced the Alaska Federation of Natives bill, S. 835, 92d Cong., 1st Sess. (1971); the Department of the Interior's bill, S. 1571, 92d Cong., 1st Sess. (1971), was introduced by Senator Mondale. S. 35, amended and renumbered as H.R. 10367, passed the Senate and went to the conference committee on Nov. 2, 1971.

These proposals differed substantially as to the quantity and source of land and monetary entitlement contemplated, and as to the organizations envisioned to administer the settlement. Potential conflicts over rights to land and money between the State of Alaska, asserting entitlement under the Alaska Statehood Act, and the Natives, under various settlement proposals, were recognized and discussed throughout Congressional deliberations leading to enactment of ANCSA. The status of tentatively approved land selections of the State was debated extensively, and resolution of this matter was central to the settlement scheme which Congress finally adopted.

While the State did not oppose transfer of certain State-selected lands to Native villages, the State from the beginning took the position that such lands, including those not yet tentatively approved, were no longer entirely Federal lands, and could not be made available by Congress for Native selection. In testimony during hearings on H.R. 13142 and H.R. 10193, Governor Keith Miller in 1969 pledged that the State would transfer title to villages surrounded by State-selected lands. Enlarging on the Governor's testimony, Mr. G. Kent Edwards, Attorney General of Alaska, explained the State's position:

\* \* \* lands which are vacant, unappropriated and unreserved on which we filed selection even though no tentative approval has been received, that those lands are really now along the road to

becoming lands of the State, and that the Federal government's rights to those lands are different than they would have been if our selection had not been filed and that, therefore, patent to those particular lands to another group would have to come from the State.

(Hearings on H.R. 13142 and H.R. 10193 before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 91st Cong., 1st Sess., Ser. No. 91-8, p. 164 (1969)).

Although the Alaska Federation of Natives' proposals were not at that time before the House in a bill, the AFN stated its position clearly in memoranda filed for the record on H.R. 13142 and H.R. 10193. The basic position of AFN was that the Alaska Statehood Act left unimpaired the power of Congress to reserve for conveyance to Alaska Natives lands to which the United States still held title; that is, as between the State and the United States, lands not yet patented.

Discussing the legality of Native selections of lands already selected by the State, and of a proposed Native right to an overriding 2 percent royalty on mineral revenues from State and Federal lands, AFN relied strongly on the disclaimer language in sec. 4 of the Alaska Statehood Act. Discussing the disclaimer, the AFN memorandum asserted:

The only possible significance of the disclaimer is to preserve Congress's options with respect to selected and tentatively approved lands. For it is only as to such lands that the State could obtain any rights through the exercise of selections under Section 6. Nowhere in any

of the Committee reports on Alaska Statehood legislation can there be found any suggestion that Congress intended by the Statehood Act to extinguish the Native claims and to remit the Natives solely to claims against the United States. Such a construction of the Act would reduce the disclaimer to an illusion; \* \* \*

(Hearings on H.R. 13142 and H.R. 10193 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 91st Cong., 1st Sess., Ser. No. 91-8, p. 259 (1969).)

AFN argued that Native claims to more than 90 percent of the land in Alaska based on aboriginal use and occupancy were legally valid, based on the Federal policy of protecting aboriginal occupancy; that only Congress could extinguish aboriginal title; and that Congress had never done so. (Hearings on H.R. 13142 and H.R. 10193, *supra*, pp. 181-184.) AFN asserted that only if Congress had already made an irrevocable disposition of lands was Congress precluded from conveying certain of the lands to Natives and reserving a royalty interest in other lands, as part of the legislation by which it extinguished aboriginal rights; State selections and tentative approval thereof did not constitute such a disposition because of the disclaimer language in sec. 4 of the Statehood Act. (Hearings on H.R. 13142 and H.R. 10193, *supra*, p. 256.)

The opposing positions of the AFN and the State were again focused in an exchange between former United States Attorney Gen-

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eral Ramsey Clark, appearing for the AFN, and Senator Ted Stevens, during testimony on S. 1830.

SENATOR STEVENS: It is my understanding there is no conflict between the recommendations that are made here today and existing State rights, that is, in terms of State selections, already patented or State selections to which there have been tentative approvals given, is that correct?

MR. CLARK: There is no effort in the Native settlement proposal here to interfere with vested property rights, so where there has been a full and unconditional patent or deed to fee title, the Natives recognize that as to that particular place and they do not propose selection rights.

SENATOR STEVENS: \*\*\* Again, my point is, as I understand it, the Native people of Alaska are not contesting the State's title to lands that have been patented or the State's title to lands to which tentative approval has been given. In other words, we are not going to go back and try to reverse anything that was done prior to the time the land freeze was put into effect; isn't that correct?

MR. CLARK: Well, it is right as to the patent \*\*\*. On tentative approval, the Federation had not taken a position on that here. \*\*\* The Federation had not stated in this proposal that it makes no claim.

SENATOR STEVENS: Let us make sure we understand one another. There are three divisions. There is the filing of the State's selection which gives the State no rights. There is tentative approval which gives the State equivalent [sic] title, and all that is left is the issuance of patents; and there is the issuance of patents. Now, are you saying that your clients have not taken a position on the land to which the State has been given tentative approval after State selection? I hope you know what you are saying, because that is what Prudhoe Bay is on, and that is what all of the North Slope discoveries are based on; they are based

on tentative approval. If there is a conflict in approval here for tentative approval, I want it in the record, and I want to be very clear that everyone understands it. \*\*\*

MR. CLARK: Well, let me have President Notti, who can speak better for the Federation than I, \*\*\* address himself to that \*\*\*

MR. NOTTI: Senator, we have discussed this in our meetings, and as far as patented lands go to State or individuals, we here make no claims against that. Lands that have not been patented, have not gone to final patent, and that includes tentative approval, we are not willing to concede at this time that we do not have selection rights in these areas. We think we do.

SENATOR STEVENS: You are not willing to concede that the Statehood Act, which gave the State the right to receive lands but have not been given final approval, that is the TA lands, you are not willing to concede that those are, in fact, State lands and will not be affected by this bill?

MR. NOTTI: No, Sir, we are not conceding that.

(Hearing on S. 1830 before the Senate Comm. on Interior and Insular Affairs, 91st Cong., 1st Sess. (1969), pp. 344-345.)

Senator Stevens in addition criticized the AFN's position strongly, concluding with the flat statement, "\*\*\* I, as a Senator from Alaska, will not support the Alaska Native people in contesting the title of the State of Alaska to the lands patented or to lands to which tentative approval was given before the land freeze." (Hearings on S. 1830, *supra*, p. 348.)

In S. 1571, the Department of Interior retreated from its previous position that the sharing of reve-

nues from oil development was unconstitutional, and proposed Native land selection entitlement of 40 million acres in fee. Addressing the possibility that villages might be surrounded by TA'd lands, it was suggested that the villages would have to select from lands outside the TA'd area. (Hearings on S. 35, S. 835, and S. 1571 before the Senate Comm. on Interior and Insular Affairs, 92d Cong., 1st Sess., Part 2 (1971), pp. 462, 463.) In response to Native testimony that village residents wished to select lands in their immediate vicinity, even if already TA'd to the State, arrangements by which the State could exchange such land for others were discussed. Senator Stevens endorsed this concept, as an alternative to the disturbance by Congress of tentative approvals. (Hearings on S. 35, S. 835, and S. 1571, *supra*, pp. 469-472.) The AFN opposed it, urging that the TA land problem be solved by Congress and that Congress provide the same selection rights for villages on TA's lands as for all other villages. (Hearings on S. 35, S. 835, and S. 1571, *supra*, p. 473.)

In support of its position, the AFN introduced into the record a letter from former Secretary of the Interior Stewart L. Udall to Senator Jackson, Chairman of the House Committee on Interior and Insular Affairs, which explained the Secretary's interpretation of the effect of TA's on Native land claims:

According to my understanding, a question has arisen in consideration of

the pending Alaska Native Claims Settlement Bills as to the impact upon the Natives land rights of tentative approval by the Secretary of the Interior to a land selection by the State of Alaska pursuant to the 1958 Statehood Act. I am writing, therefore, in order to clarify for your Committee the position I took on this question during the period of 1961-1969 when I served as Secretary and thus was ultimately responsible for the issuance of all tentative approvals for State land selections.

At the offset I wish to point out that, even while the Department still was processing State land selections, we knew that substantial portions of Alaska were the subject of Native claims based upon traditional patterns of use and occupancy, including subsistence hunting, fishing and gathering, and, indeed, many State's selections in fact were the object of specific Native protests. In giving tentative approval to some State selections, I can assure you that I, as Secretary, did not intend to prejudice these Native claims or in any other way to foreclose the Natives from showing their entitlement to the land. I then took the position, as I do now, that proof of Native ownership would bar the issuance of a patent to the State, regardless of whether or not the State's land selection had been given tentative approval.

As a positive indication of the Department's views during my term of office, I need cite only the case of *State of Alaska v. Udall*, 420 F. 2d 938 (9th Cir. 1969), in which the State attempted to force me through a mandamus action to issue a patent to a tentatively approved selection of land which also was claimed by the Native Village of Nenana. The Federal Government vigorously resisted Alaska's contention that tentatively approval materially changed the legal status of selected land and that the Natives claims could or should be overridden, and our position was sustained by the United States Court of Appeals for the Ninth Circuit. I do not see how any other result could have been reached in view

of Section 4 of the Statehood Act under which Alaska disclaimed all right and title to "any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts \* \* \*."

Finally, I wish to note that the Natives protests against State land selections never have been determined within the Department, but rather have been held in abeyance during the "land freeze."

Thus, if the proposed Settlement Act prevents Native villages from obtaining title to tentatively approved State land, selections in all cases, as several of the bills would provide, Congress will, in effect, have legislatively decided such protests adversely to the Natives without a hearing on the merits.

(Hearings on S. 35, S. 835, and S. 1571, *supra*, pp. 489, 490.)

The difficult issue of selection priorities between the State and villages to TA'd lands surrounding the villages was discussed by various witnesses. While the State continued to favor a system of land exchanges under the auspices of State legislation, such legislation was not enacted. (Hearings on S. 35, S. 835, and S. 1571, *supra*, pp. 491, 494.) John Borbridge testifying on the "Administration Bill," S. 1571, summed up the AFN position:

What the draftsmen of this Bill obviously preferred to ignore is that the Native villages did not impose themselves on the State's selections and the Federal reserves. The villages were there first and have always had preeminent possessory rights. Fairness requires that the Natives' rights to retain land in the vicinities of their villages be paramount and not subordinate to State and Federal interests which in most cases did not come into existence until centuries after the villages were established.

(Hearings on S. 35, S. 835, and S. 1571, *supra*, pp. 497, 498.)

Similar concerns were stated during hearings on H.R. 3100, H.R. 7039, and H.R. 7432 in May of 1971. Querying Secretary Morton and Department of the Interior Solicitor Frank Bracken on H.R. 7432, which made TA'd lands unavailable for village selection, Representative Patsy Mink noted that as many as seventeen villages might be effected by the prior rights of the State, and questioned the rationale for treating tentatively approved lands the same way as patented lands. (Hearings on H.R. 3100, H.R. 7039, and H.R. 7432 before the Subcom. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 92d Cong., 1st Sess., Serial No. 92-10 (1971), pp. 109, 110.)

Governor Egan again sought to solve the problem through State legislation:

The State recognizes that a problem exists with regard to lands actually occupied by Natives which have been selected, tentatively approved or patented to the State already. I have introduced legislation in the Alaska Legislature to withdraw one township per village and to recognize and grant title to individuals through the State when that individual would have been entitled to an Indian allotment but for the selection or patent.

Pending this legislation to make permanent the withdrawal, the withdrawals have been accomplished by administrative action. In addition the State already has laws on the books designed to enable it to trade lands when acquired by Natives under the claims to allow villages to increase their holdings in the immediate proximity.

(Hearings on H.R. 7039, and H.R. 7432, *supra*, at 133.)

A copy of the above-referenced legislation is reproduced in the hearing record. The bill provided for withdrawal from entry or disposal under Alaska law, subject to valid existing rights, of all unappropriated public lands of the State within the single township enclosing each village listed in S. 35, or any village meeting the same criteria. The statement that withdrawal is subject to valid existing rights contemplates that the State may process to approval or rejection under the State public land laws any entry made prior to the legislation. Public lands of the State are defined as those which have been, or may be, selected under the Statehood Act. (Hearings on H.R. 3100, H.R. 7039, and H.R. 7432, *supra*, pp. 368, 369.) The bill was never enacted.

Representative Lloyd Meeds, sponsor of the "AFN bill," H.R. 7039, discussed the problem of villages surrounded by TA'd lands with Governor Egan and Attorney General John Havelock. Governor Egan agreed that special arrangements should be made for these villages, and Mr. Havelock expressed doubts as to whether Congressional or State action was appropriate. (Hearings on H.R. 3100, H.R. 7039, and H.R. 7432, *supra*, at 153, 154.) The following exchange then took place:

MR. MEEDS: Well, let me tell you just for your own edification what some of us think we can do. We think that under Sec. 4 of the Statehood Act that we

could go clear back to all those lands if we deemed it essential to do so.

MR. HAVELOCK: There is a substantial legal question, we believe, Mr. Meeds, that would be involved in that. As I say, I think it is preferable to avoid it.

MR. MEEDS: I agree, but some of us feel we can do it.

MR. HAVELOCK: I am sure.

MR. MEEDS: In any event, would you be willing \* \* \* for the State of Alaska to contribute to villages on the TA'd lands, what the Federal Government is willing to contribute to the other villages?

MR. HAVELOCK: I think on the patterns set out by Governor Egan that the State would, if that is the formula adopted the State would. I think legally the simplest way to handle is on a trading basis.

(Hearings on H.R. 3100, H.R. 7039, and H.R. 7432, *supra*, at 154.)

Pursuing the question of TA'd lands, Representative Patsy Mink inquired whether the State would abide by a decision of Congress to set aside four townships for village selection, including TA'd lands. Mr. Havelock then noted the problem central to the present appeal:

\* \* \* Now there is also a problem with some of these villages being semi-urban or close around urban areas, on the Kenai Peninsula in particular, *for that matter Eklutna is recognized as basically a suburb of Anchorage. If you start swooping up areas like four townships of all approximate [sic] land around there you basically cut Anchorage in a ring of Native-owned land.* You are talking about surface values, various substantial surface values, because of the urban nature of the land. (Italics added.)

(Hearing on H.R. 3100, H.R. 7039, and H.R. 7432, *supra*, at 160.)

Asked by Mrs. Mink how many urban areas existed in which Native

selection of four townships would prevent growth and expansion, Mr. Havelock replied that there were probably two or three. (Hearings on H.R. 3100, H.R. 7039, H.R. 7432, *supra*, p. 161.)

Mrs. Mink responded:

So the effects of such a subrogation of State rights, with the exception of the urban areas, would cause no other conflict insofar as your analysis of the situation? \* \* \* Am I interpreting your statement correctly that your only reservation is in a city area like Anchorage where this would limit the development of the city?

(Hearings on H.R. 3100, H.R. 7039, and H.R. 7432, *supra*, at 161.)

Governor Egan responded affirmatively, and agreed that the Commission established under H.R. 7432 and H.R. 7039 should work closely with the State to adjust the equities in such situations. S. 35 provided for establishment of such a body but the concept was dropped in H.R. 10367.

The AFN continued to oppose Governor Egan's proposal to solve conflicts between village selections and tentatively approved lands through State legislation. In a letter to James Haley, Chairman of the Subcommittee on Indian Affairs, counsel for AFN pointed out that the State legislation contemplated a withdrawal of only one township enclosing each village, as against four proposed by AFN; that the State could not convey subsurface minerals to the Natives; and that Congress could and should resolve this inequity through the exercise of its reserved powers

under the Statehood Act to make TA'd lands available for Native selection. (Hearings on H.R. 3100, H.R. 7039, and H.R. 7432, *supra*, at 376.)

The State responded to the AFN's presentation by testimony, as well as memoranda and briefs, on the record before the Senate and the House (*See*: Letter from G. Kent Edwards, Attorney General, State of Alaska, to Hon. Wayne N. Aspinall, Sept. 5, 1969. Hearings on H.R. 13142 and H.R. 10193, *supra*, 240-249; Letter from G. Kent Edwards, Attorney General, State of Alaska, to Hon. Henry M. Jackson, Oct. 6, 1969, Hearings on S. 1830, *supra*, 404-482.)

Appearing on behalf of nine Native villages and the Kenai Peninsula Native Association, Mr. Hugh F. Fleischer of the Alaska Legal Services Corporation contended that the lands surrounding village sites was clearly not "vacant" within the terms of the Statehood Act, and therefore were not properly selected by the State. Mr. Fleischer referred to the authority recognized by Congress to dispose of 2 percent royalties from tentatively approved lands. He stated:

\* \* \* that same authority should be used in the case of contiguous lands to villages that otherwise would be precluded from an adequate and equal selection.

We are asking for only one thing and that is these villages be given equal footing with all the other villages in the State and not limited in selection rights that they would otherwise have for the tentative approval that exists with respect to their contiguous village lands.

(Hearings on H.R. 3100, H.R. 7039, and H.R. 7432, *supra*, at 326.)

Responding to Mr. Havelock's remarks on interference with urban areas, Mr. Fleischer responded with testimony which appears to have lost considerable clarity in transcription and which, as reported, appears likely to have been misleading. Mr. Fleischer's testimony is recorded as follows:

The only two urban areas that would be possibly affected by any of the villages in question here are first of all are *Klukwan*, which is a small village 26½ miles north of Anchorage and separated from Anchorage by the Fort Richardson Military Reservation.

I have observed between Anchorage and *Klukwan* hundreds of moose grazing in the land that separates the village of *Maclutma* from Anchorage and I don't think there is a basis for asserting that is part of the metropolitan Anchorage area. \* \* \* We don't think that this legislation we are proposing would create any serious problems with respect to third party interests in view of the fact that in most cases we are discussing and most of the parties are not established third party interests and similarly neither the Department of Interior nor the Department of State asserted any mineral lands here.

We feel Congress has authority to enact legislation that would put these villages on equal footing with the other villages. We feel that the strong facts that relate to the subsistence needs of the villages to the lands in question that Congress should amend whatever legislation it passes to specifically afford these villages equal footing or in the alternative enact 7039.

(Hearings on H.R. 3100, H.R. 7039, and H.R. 7432, *supra*, at 327.)  
(Italics added.)

Following the hearings on S. 35 and S. 835 previously referenced herein, S. 35 was amended to include a subsec. 13(b)(1)(B) withdrawing "all public lands and also all lands which have been selected and tentatively approved for patent to the State under the Statehood Act, but which have not been patented on the date of enactment of this Act, in each township which encloses all or part" of sixteen listed Native villages which were believed to be located on tentatively approved lands. (S. Rep. No. 92-405, 92d Cong., 1st Sess. 24 (1971)). The Senate thus asserted its power to dispose of lands selected by, and tentatively approved to, the State, as urged by the AFN.

Subsequently H.R. 10367, which became ANCSA, went one step further and made up to 69,120 acres of TA'd lands available for selection in all cases where such lands were located within the 25-townships withdrawn for selection by each Native village. House Report 92-523, submitted by Representative Haley, notes:

Sec. 9(b)(2) permits each Native village to select an area equivalent to three townships from lands previously selected by the State and tentatively approved under the Alaska Statehood Act. The selections, however, must be within the 25-townships surrounding the village. The Committee was informed that the Governor of Alaska is not opposed to this provision, and we expect a conflict will be avoided by the Governor's withdrawal of his selection of the lands selected by the villages.

(H.R. Rep. No. 92-523, 92d Cong., 1st Sess. 9 (1971)).

Referring to provisions, also contained in ANCSA, protecting conditional leases issued on TA'd lands under sec. 6(g) of the Statehood Act, the author observes:

\* \* \* The purpose of this \* \* \* is to prevent the termination of a lease issued by the State which by its terms was made conditional on the issuance of a patent to the State. *Selection by the Natives will prevent the issuance of a patent to the State*, but the lease will be treated as though the patent had been issued. \* \* \* (Italics added.)

(H.R. Rep. No. 92-523, *supra*, 9.)

During discussion in the Senate on the Conference Report on H.R. 10367, Senator Stevens queried Mr. Bible as to whether or not *TA lands, withdrawn for village selection but not selected by villages would, at the end of the withdrawal period*, be patented to the State. Senator Bible replied: "*\* \* \* the answer is unquestionably yes.*" (117 Cong. Rec. 196, S 21655 (daily ed. Dec. 14, 1971.)) (Italics added.)

In view of the clear presentation by the AFN and the State of their opposing views on the legal status of tentative approvals, it must be concluded that the conflict between State TA's and Native selections, and the uncertainty of the State's title to TA'd lands, were plainly and timely set forth on the record before Congress for its deliberations on the settlement of Native claims.

Thus, after extensive testimony and discussion before committees of the House and Senate on the status of the State's title to tentatively approved lands and the power of Congress over such lands,

Congress unequivocally dealt with tentatively approved lands in a manner which the Board finds totally inconsistent with the State's assertion of equitable title. It is clear that Congress concurred in the AFN position, and treated tentatively approved lands as a Federal interest within Congressional powers of disposal, at any time prior to Congressional extinguishment of aboriginal title. This moots the State's repeated argument that the State was a necessary party, whose acquiescence was required and given, in the enactment of ANCSA.

### THE EFFECT OF ANCSA

In ANCSA Congress, exercising its exclusive jurisdiction to extinguish aboriginal claims and to dispose of lands in Federal ownership, created in Alaska Natives a statutory entitlement, requiring no proof of use and occupancy, to 40 million acres of land. This entitlement must be satisfied, for the most part, from "public" lands, defined in sec. 3(e) as "all Federal lands and interests therein located in Alaska *except*: \* \* \* land selections of the State of Alaska which have been patented or tentatively approved under sec. 6 (g) of the Alaska Statehood Act, \* \* \*." (Italics added.)

[7] However, responding to the problem of villages in proximity to TA'd lands ANCSA also provides, in secs. 11(a)(2) and 12(a)(1), that each village may select up to 69,120 acres of its total entitlement

from lands "that have been selected by, or tentatively approved to, but not yet patented to, the State under the Alaska Statehood Act," within the area, usually 25-townships, surrounding the village. Such State land selections, already encumbered by aboriginal title to lands on which use and occupancy could be proved, were now subjected to a statutory prior right of selection by Native Corporations, based not on aboriginal title, but on Congressional grant in ANCSA.

Congress then, in ANCSA, extinguished all claims based on aboriginal title, stating in sec. 4(a):

All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to sec. 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.

[8] As noted by the court in *Edwardsen v. Morton*, *supra*, at 1377, sec. 4(a) operates retroactively by treating tentative approvals as "extinguishment of aboriginal title." As a result of this retroactive extinguishment, the State's interest vested as equitable title in all those tentatively approved selections which had not, through sec. 11(a)(2) of ANCSA, become subject to the Natives' statutory right of selection. Thus, the retroactive validation of the State's title applied to those lands tentatively approved to the State which were located outside Native village withdrawal area.

[9] However, extinguishment of aboriginal title did not vest the

State's title to those tentatively approved selection located *within* sec. 11(a)(2) withdrawal areas, for Congress clearly conferred on Native village corporations a superior right to select up to 69,120 acres of such lands.

[10, 11] The Board finds, therefore, that the State's interest in lands located within sec. 11(a)(2) withdrawal areas did not vest prior to ANCSA, and did not vest subsequent to ANCSA as to those lands property selected by village corporations within the three year time period under sec. 12(a). However, the Board finds that the State's interest *does* vest in those TA'd lands within sec. 11(a)(2) withdrawals *not* selected by village corporations within the statutory deadlines mandated by sec. 12, for upon completion of Native selections, the last encumbrance on the State's title is removed.

This result is not inconsistent with *Edwardsen v. Morton*, *supra*, and follows expressed Congressional intent; note Senator Bible's response to questioning by Senator Stevens, quoted previously herein.

[12] It is clear from the legislative history of ANCSA that the single purpose of sec. 11(a)(2) is to make available for Native village selection those lands to which such villages would most likely be able to prove aboriginal use and occupancy—*i.e.*, lands surrounding each village. In withdrawing lands around villages tentatively approved to the State, Congress rejected the State's contention that

tentative approval vested title in the State, and in consequence, rejected the title the State had relied upon to dispose of TA'd lands to third parties. It was this consequence Senator Stevens was concerned with during hearings on S. 1830, 91st Cong., 1st Sess. (1969). In a discussion of the effect of Congressional disposition of tentatively approved lands, the following exchange occurred:

SENATOR STEVENS: Well, but this is the point; the State was given certain rights under the Statehood Act, the right to select these lands. Where the lands have been patented, there is no dispute. The only reason the patent was not issued under tentative approval was because the survey had not been done. The State and Federal Government have done everything there is to do except issue the patent.

SENATOR GRAVEL: I understand that. But suppose the State does have patent. The natives would still be looking to the State for participation if there are certain areas of State land needed to fill out the allowable land grant area around the village. If that is the case they would get land from the State, just as they would from Federal Government lands, such as the Tongas National Forest or some wildlife refuge.

That does not disturb me one iota, and I do not see an economic change of significance that will alter the wealth because they are not going to disturb the oil companies under the lease. That lease will be there.

SENATOR STEVENS: That is not true. *If the tentative approval is not recognized as equivalent of title, then the title goes to these people and the State does not have any right. The State-issued leases in this area are dependent upon State title, and that title under tentative approval is the equivalent of*

title under the Statehood Act and, as I say, this is the first time I have ever heard that the AFN has disputed this significance of tentative approval. (Italics added.)

(Hearing on S. 1830 before the Senate Comm. on Interior and Insular Affairs, 91st Cong., 1st Sess. Part 2, 347 (1969)).

[13] Since the State had not acquired equitable title to tentatively approved land selections within village withdrawal areas prior to ANCSA, the Municipality as grantee of the State could not acquire a greater interest than its grantor, and could not, prior to ANCSA, acquire equitable title sufficient to deprive Congress of power to dispose of the land in settlement of Native claims. Accordingly, any protection or priority afforded the Municipality's interest in the disputed lands must be statutory, conferred by ANCSA.

This inherent defect in the State's title is recognized in the State administrative code, 11 AAC 54.480, which provides:

The State may conditionally sell land it selects under various Federal land grants and lands it reasonably believes it will own or will acquire title to prior to the actual receipt of title. Contracts issued on this conditional basis shall be cancelled \* \* \* in the event the State is denied title to said lands. \* \* \* However, the State shall in no way be liable \* \* \* for any claim of any third party or to any claim that may arise from ownership.

Although the Municipality appears to rely on *State of Alaska*, 19 IBLA 178, the circumstances of that case are not clear enough from

the decision for the Board to relate them to the facts of this appeal, in that the decision does not disclose whether patent, if any, was issued by the State or Federal government, and the source of consent to the land transfer is not precisely identified.

In order to resolve this appeal, it must be determined whether the Municipality's interest is protected by ANCSA.

### STATUS OF MUNICIPALITY'S INTEREST UNDER ANCSA

#### *Municipality as Separate Entity.*

The Board finds that the Municipality is an entity legally capable of constituting a third party whose interest in the disputed lands is separable from that of the State. As outlined previously, the lands which are the subject of this appeal were selected by the Greater Anchorage Area Borough in 1968 pursuant to Alaska Statutes § 29.18.190. The State tentatively approved the selection on Apr. 11, 1969, under procedures in Alaska Statutes § 29.19.200. In 1975, the Greater Anchorage Area Borough merged with the City of Anchorage and the resulting unified home rule government is referred to as the Municipality of Anchorage.

Art. X, Sec. 1 of the Constitution of the State of Alaska provides:

The purpose of this article is to provide for maximum local self government with a minimum of local government units, and to prevent duplication of tax-

levying jurisdictions. A liberal construction shall be given to the powers of local government units.

Article X, Sec. 2, provides:

Local Government Powers. All local government powers shall be vested in boroughs and cities. The State may delegate taxing powers to organized boroughs and cities only.

Article X, Sec. 3, provides as follows:

Boroughs. The entire State shall be divided into Boroughs, organized or unorganized. They shall be established in a manner and according to standards provided by law. \* \* \* The legislature shall classify boroughs and prescribe their powers and functions. Methods by which boroughs may be organized, incorporated, merged, consolidated, reclassified, or dissolved shall be prescribed by law.

Title 29 of the Alaska Statutes, *Municipal Government*, in A.S. 29.48.010, lists the following municipal powers, exercised by the Borough and its successor, the Municipality:

\* \* \* \* \*

(4) to enter into agreements, \* \* \* with the State, or with the United States;

\* \* \* \* \*

(6) to sue and be sued;

\* \* \* \* \*

(9) to acquire, manage, control, use and dispose of real and personal property \* \* \*

\* \* \* \* \*

A.S. 29.48.260. Municipal Properties, provides:

(a) A municipality may acquire and hold real and personal property or interest in property, \* \* \*

(b) \* \* \* a municipality may sell, lease, donate or exchange with the United States, the state, or a political subdi-

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vision real estate or other property, or interest in property, \* \* \*.

\* \* \* \* \*

Municipal powers to sue have been exercised against the State; in *Kenai Peninsula Borough v. State of Alaska*, 532 P. 2d 1019 (1975), the Court held that the Borough, in transporting students by school bus, did not act as agent of the State.

In *Wellmix, Inc. v. City of Anchorage*, 471 P. 2d 408, 410 (1970), an eminent domain action, the Court held that the City of Anchorage, the condemnor, was not an "agency" of the State within Supreme Court Rule 7(a), regarding the appeal period allowed in an action to which "the State or an agency thereof" is a party.

In *Chugach Electric Association v. City of Anchorage, Alaska*, 476 P. 2d 115 (1970), an electric utility holding a certificate of public convenience and necessity from the Public Service Commission (a State agency), sought relief from the City's refusal to issue a building permit, required under City Ordinance for the construction involved in providing service to a bowling alley. Construing the problem as a conflict between a municipal ordinance and the State statute vesting power in the Public Service Commission, the Court held in favor of the State.

In none of these cases was the municipal party's standing denied on the ground that a municipality functioned as a mere "alter ego" of the State.

The Board notes that a variety of statutory provisions, cited by the Municipality in its Supplemental Brief filed June 2, 1976, appear to place municipal governments on an equal footing with other private grantees with regard to disposition of State lands. The Board further notes that, insofar as sec. 6(g) of the Statehood Act provides, "The authority to make selections shall never be alienated or bargained away, in whole or in part, by the State," a municipal government may not participate directly in the selection process, but must take as the State's grantee. A selection made by the State to protect a city's watershed was held consistent with this principle:

\* \* \* The selection was made by Alaska in its own name and, insofar as the record shows, not subject to any contract, conveyance or other transaction with the City of Anchorage. \* \* \* The fact that the interests of the state and of its political subdivision, the City of Anchorage, coincide, is without legal significance and, on this record, in no sense evidences a violation of the prohibition against alienation contained in sec. 6(g).

(*Udall v. Kalerak*, 396 F. 2d 746, 749 (9th Cir. 1968)).

[14] The Board recognizes that the Municipality is organized and may be dissolved under State law. At present, the Municipality is empowered to exercise governmental and proprietary functions under the Constitution and laws of Alaska. These functions include the acquisition, management, and disposal of land, independent of con-

trol by the State. The Board must conclude that, until revoked or modified by constitutional or legislative amendment, with the consent of the electorate, such powers remain in force and render the Municipality an entity separate from the State for purposes of holding third-party interests under ANCSA.

#### *Requirement of Consideration*

The issue of whether the Municipality's interest in the disputed lands must fail for lack of valuable consideration appears to be moot because any protection available to the Municipality is derived from ANCSA rather than from its transaction with the State. However, the Board believes that consideration is not necessary.

Sec. 6(g) of the Alaska Statehood Act, 72 Stat. 339, *as amended*, provides in part:

\* \* \* All lands duly selected by the State of Alaska pursuant to this Act shall be patented to the State by the Secretary of the Interior. *Following the selection of lands by the State and the tentative approval of such selection by the Secretary of the Interior or his designee, but prior to the issuance of final patent, the State is hereby authorized to execute conditional leases and to make conditional sales of such selected lands.*

\* \* \* (Italics added.)

The original bill, S. 49, 85th Cong., 1st Sess., sec. 6(g) (1957), did not contain the language above italicized. The sentence was added by committee staff, but using the phrase "appropriate officer or agency of the Federal Government" in place of, "the Secretary of the Interior or his designee," in a commit-

tee print prepared for use as a worksheet by the Senate Committee on Interior and Insular Affairs. (Staff of Senate Committee on Interior and Insular Affairs, 85th Cong., 1st Sess., Comm. Print 2, 1957.) The same language, changed only by the reference to the Secretary, was retained through passage of the Statehood Act.

The Board has been unable to find any explanation as to why the italicized language was added to S. 49. However, the Board does not construe this language authorizing certain specified transactions as a prohibition on all other undertakings by the State involving tentatively approved land selections.

It appears more likely that the authorizing language was added to emphasize the State's power to lease or sell resources prior to issuance of patent, rather than to limit the new State's power to develop its lands and resources, subject only to resolution of Native claims.

The pertinent provisions of the applicable State statutes from which the interests of the Municipality derive are located in Title 29 of the Alaska Statutes, Municipal Government, Ch. 13, Home Rule Municipalities, Art. 3, Transitional Assistance, Sec. 29.18.190, State Land and Sec. 29.18.200, Selection Procedure. (Previously A.S. 07-10.150 and 160.)

The pertinent part of A.S. 29-18.190 is as follows:

A borough or city may select 10 per cent of the vacant, unappropriated, unreserved state land located within its boundaries. In the selection of land

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under the Alaska Statehood Act, it is the policy of the state to make available to cities and boroughs, the maximum land area from which to make selections under this section consistently with the best interests of the state. Nothing in this section affects a valid existing claim, location, or entry under the laws of the state or the United States whether for homestead, mineral, right-of-way or other purpose or affects the rights of an owner, claimant, locator, or entryman to the full use and enjoyment of the land so occupied.

A.S. 29.18.200 provides in pertinent part:

(a) All selections must be made in reasonably compact tracts, taking into account the situation and potential uses of the land involved. The authority to make selections may not be alienated or bargained away, in whole or in part, by the borough or city.

(b) If land desired by the borough or city is unsurveyed at the time of its selection, the Department of Natural Resources shall survey or approve a survey by the borough or city of the exterior boundaries of the area requested without interior subdivision and shall issue a patent for the selected area in terms of the exterior boundary survey. The cost of survey is borne by the borough or city. If land desired by the borough or city has been surveyed at the time of its selection, the boundaries of the areas requested must conform to the public land subdivisions established by the approval of the survey. Land selected by the borough or city under this chapter is patented to the borough or city by the Department of Natural Resources.

(c) After the selection of the land by the borough or city but before the issuance of final patent, the borough or city may execute conditional leases and make conditional sales of selected land.

[15] Having concluded that the State was not prohibited by sec. 6(g) from granting tentatively ap-

proved lands to local governments, the Board notes that interests in real property may be created by gift or grant as well as by purchase. There appears to be no requirement in the Statehood Act or in the above selection procedures contained in A.S. 29.18.190 for payment of consideration for the selection of state land. The Board finds that the Municipality's interest in the disputed lands does not fail for lack of consideration.

*Effect of Resolutions 68-9 and 68-10.*

In arguments previously summarized, the Municipality takes the position that Eklutna, Inc., is estopped to select the lands in dispute as a result of the execution by the Eklutna Village Council of the above resolutions. The Board cannot agree.

Insofar as Native Protest #368, filed by George Ondola, President of the Eklutna Village Council, barred tentative approval of the State's selection of the disputed lands pending adjudication, it appears that the Resolutions might have withdrawn the protest as to the same lands so as to permit tentative approval. However, the unadjudicated claim of the Natives of Palmer remained outstanding.

[16] As asserted without challenge by Eklutna, Inc., the settlement or community at Eklutna has at no time been organized as a reservation, corporation, or any other legal entity. The Eklutna Village Council was merely a committee

which sought legal status for itself and its village without success, until enactment of ANCSA and recognition and incorporation of Eklutna as a Native Village under the Act. There is no evidence of any identity of interest or membership between the former Eklutna Village Council and the present Eklutna, Inc., nor is there any indication that the Eklutna Village Council was authorized to speak for the Natives of Palmer.

As between Eklutna Village Council, a group of persons representing an unincorporated community, and Eklutna, Inc., a Village Corporation organized pursuant to ANCSA, the Board finds no legal relationship.

#### *Protection under ANCSA.*

Having rejected the arguments that the Municipality's interest must fail because it is inseparable from the State's, because it is unsupported by consideration or because of resolutions passed by the Eklutna Village Council, the Board must determine whether the Municipality's interest is protected, by ANCSA, against Native Village selection.

The State Director, Bureau of Land Management, found that the State's approval granted subsequent to tentative approval of State selection of the same lands, subsequent to Resolutions No. 68-9 and 68-10 in which Eklutna Village Council consented to selection of the lands by the Borough for school purposes, followed by the Borough's improvement of the land, resulted

in a situation in which "a valid existing right as set forth in sec. 22(b) of the Alaska Native Claims Settlement Act was firmly established prior to passage of the Act on Dec. 18, 1971."

The Board cannot agree with this conclusion. Sec. 22(b) of ANCSA provides as follows:

The Secretary is directed to promptly issue patents to all persons who have made a lawful entry on the public lands in compliance with the public land laws for the purpose of gaining title to homesteads, headquarters sites, trade and manufacturing sites, or small tract sites (43 U.S.C. § 682), and who have fulfilled all requirements of the law prerequisite to obtaining a patent. Any person who has made a lawful entry prior to Aug. 31, 1971, for any of the foregoing purposes shall be protected in his right of use and occupancy until all the requirements of law for a patent have been met even though the lands involved have been reserved or withdrawn in accordance with Public Land Order 4582, as amended, or the withdrawal provisions of this Act. *Provided*, That occupancy must have been maintained in accordance with the appropriate public land law: *Provided further*, That any person who entered on public lands in violation of Public Land Order 4582, as amended, shall gain no rights.

[17] The language of sec. 22(b) is specific and unambiguous, reflecting the concern of Congress for a class of persons whose circumstances and interests are carefully described. The interests protected are those of entrymen under the Federal public land laws governing homesteads, headquarters sites, trade and manufacturing sites, and small tract sites. To avoid any confusion, sec. 22(b) provide a citation

to the law governing the latter type of entry. Patents are to be issued promptly to entrymen who have complied with all necessary prerequisites. Entrymen who have not yet complied fully with requirements for patent, whose title has therefore not vested, are protected in their use and occupancy until the requirements are met, and their right is specifically held superior to "the withdrawal provisions of this Act."

Regulations contained in 43 CFR 2650.3-1, implementing sec. 14(g) and sec. 22(b) of ANCSA, require the BLM to *exclude* from conveyance "*any lawful entries or entries which have been perfected under, or are being maintained in compliance with, laws leading to the acquisition of title*, but \* \* \* include land subject to valid existing rights of a temporary or limited nature such as those created by leases (including leases issued under sec. 6(g) of the Alaska Statehood Act), contracts, permits, rights-of-way, or easements." (Italics added.)

[18] The Municipality's interest, in comparison, was created by the State of Alaska, not the United States, and is derived from the Statehood Act, not the Federal public land laws referenced in sec. 22(b) of ANCSA. The Municipality, having received tentative approval from the State for a land selection under State law on lands tentatively approved to the State under the Statehood Act, is simply not a "person who has made a lawful entry \* \* \* in compliance with

the public land laws for the purpose of gaining title to homesteads, headquarters sites, trade and manufacturing sites, or small tract sites \* \* \*." The Board concludes that the Municipality's interest is not protected from Native selection by sec. 22(b), because that provision of ANCSA is not applicable.

Congress contemplated that certain property interests created by the State and by the United States prior to enactment of ANCSA would be protected against Native selection rights.

[19] Secs. 11(a)(1) and 11(a)(2) of ANCSA direct withdrawals for village selection to be made "subject to valid existing rights." The withdrawal of State TA'd lands in sec. 11(a)(2) impliedly recognizes the existence of third-party interests created by the State prior to ANCSA, by prohibiting the creation of such interests subsequent to the withdrawal.

[20] ANCSA protects, as "valid existing rights," those rights, whether derived from the State or Federal government, which do not lead to a grant of fee title and which were created prior to enactment of ANCSA. Rights leading to a fee, which had vested prior to enactment, would not be subject to Congressional disposal and would be excluded from withdrawals for Native selection. Rights of entrymen leading to grant of a fee under Federal public land laws, which had not vested prior to enactment of ANCSA, are treated by ANCSA as if vesting had occurred and are

not categorized as "valid existing rights."

Sec. 14(g) of ANCSA provides:

All conveyances made pursuant to this Act shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this Act, a lease, contract, permit, right-of-way, or easement (including a lease issued under sec. 6(g) of the Alaska Statehood Act) has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him. Upon issuance of the patent, the patentee shall succeed and become entitled to any and all interests of the State or the United States as lessor, contractor, permitter, or grantor, in any such leases, contracts, permits, rights-of-way, or easements covering the estate patented, and a lease issued under sec. 6(g) of the Alaska Statehood Act shall be treated for all purposes as though the patent had been issued to the State. \* \* \*

The specific provision for leases issued under sec. 6(g) of the Alaska Statehood Act is in accord with the recognition in sec. 11(a)(2) of the State's right to create third-party interests prior to enactment of ANCSA and withdrawal thereunder of the limited amount of State TA'd land vulnerable to Native selection.

Any conveyance issued for surface and subsurface rights under this act will be subject to any lease, contract, permit, right-of-way, or easement and the rights of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted him.

Sec. 2650.4-2 provides for the grantee of a conveyance under ANCSA to succeed to the interest of the State or the United States as lessor, contractor, permitter, or grantor; and 2650.4-3 sets forth procedures for administration of leases, contracts, permits rights-of-way, or easements to which a conveyance is made subject, by the Secretary of the Interior.

[21] As recognized in the regulations previously quoted, the interests described in sec. 14(g) of ANCSA are of a temporary or limited nature, in contrast to those interests derived from laws leading to a grant of fee title such as the entries protected by sec. 22(b). Inclusion in Native conveyances of lands subject to such interests, under administrative arrangements outlined in sec. 14(g) is appropriate, because such temporary or limited interests are not incompatible with Native ownership of the fee.

Regulations in 43 CFR 2650.3-1, previously quoted, require "land subject to valid existing rights of a temporary or limited nature such as those created by leases" to be included in conveyances to Native Corporations. Sec. 14(g) of ANCSA provides for the administration of such interests so that the holders thereof may receive the benefit of their bargain, while the Native Corporation holding the land receives the revenues. It should be noted that sec. 14(g) treats State-created interests to some degree as a special inclusion; enumerating valid existing rights to

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which conveyances will be subject, it lists "a lease, contract, permit, right-of-way, or easement" and then adds expressly ("including a lease issued under sec. 6(g) of the Alaska Statehood Act).". Similarly, in providing that patentee shall succeed as landlord to the interests of the State or the United States, it is specifically stated that "a lease issued under sec. 6(g) of the Alaska Statehood Act shall be treated for all purposes as though the patent had been issued to the State."

Implementing regulations to 43 CFR 2650.4-1, Existing rights and contracts, provide:

While sec. 6(g) of the Statehood Act authorized issuance of both conditional leases and conditional sales on lands tentatively approved to the State, sec. 14 (g) of ANCSA refers only to leases under sec. 6(g). It is reasonable to conclude that this reflects the concern of Congress, solicited during testimony on conflicts between Native selections and TA's lands, for State leases on North Slope oil lands. (*See* remarks of Senator Stevens, quoted herein, and the quotation from House Report 92-523.)

[22] The Municipality is not protected under sec. 14(g) because interest, if perfected, would appear to be one leading to acquisition of title. Having complied with A.S. 29.18.200, the Municipality appears to be entitled, under that statute, to issuance of a patent by the State upon completion of survey, assuming title in the State. Such an interest is not of a temporary or

limited nature, nor would it be compatible with conveyance of the land to a Village Corporation as contemplated by sec. 14(g).

If Eklutna, Inc., received conveyance subject to the Municipality's interest, the acreage encompassed would be charged against the Village Corporation's land entitlement, but the Village would not in the foreseeable future receive either the use of the land or any revenues from the Municipality's use, since the latter's interest derives from a grant rather than a lease or purchase. The Board, therefore, concludes that the Municipality's interest is not protected under the provisions of sec. 14(g) of ANCSA.

The Act further provides, in sec. 14(c), that Village Corporations, upon receipt of patent, shall convey the surface estate in lands occupied and used for various purposes to the occupants and users thereof, without requiring claim or color of title. Prospective recipients include individuals using lands as a primary place of residence, primary place of business, subsistence camp sites, or headquarters for reindeer husbandry; non-profit organizations; municipal corporations; and State or local governments with regard to airport operation. Sec. 14(c)(3) specifically provides:

the Village Corporation shall then convey to any Municipal Corporation in the Native village or to the State in trust for any Municipal Corporation established in the Native village in the future, title to the remaining surface estate of the improved land on which the Native village is located and as much additional land as

is necessary for community expansion, and appropriate rights-of-way for public use, and other foreseeable community needs: *Provided*, That the amount of lands to be transferred to the Municipal Corporation or in trust shall be no less than 1,280 acres; (Italics supplied.)

Regulations in 43 CFR 2651.5, Conveyance reservations, provide:

In addition to the conveyance reservations in § 2650.4 of this chapter, conveyances issued to village corporations shall provide for the transfer of the surface estates specified in sec. 14(c) of the act,  
\* \* \*

43 CFR 2650.5-4, Village surveys, provides:

\* \* \* \* \*

(b) Surveys will be made within the village corporation selections to delineate those tracts required by law to be conveyed by the village corporations pursuant to sec. 14(c) of the act.

\* \* \* \* \*

The regulations in secs. 2650.5-4 (c) (1) and (c) (2) provide for the boundaries of such tracts to be posted on the ground and shown on a map submitted to BLM after approval by the village, with conflicts as to transferees resolved before submission of the map. The map upon final written approval becomes a plan of survey.

Congress clearly intended to avoid conflict between Village Corporations organized for purposes of ANCSA, and municipal corporations organized in the villages for local government purposes under State law.

[23] Municipal corporations, organized to provide necessary government services, are beneficiaries under sec. 14(c) of ANCSA

in that, they receive title to lands they use and occupy; indeed, they are entitled to all the improved land on which the village is located, and to additional lands as necessary for community expansion and other foreseeable needs. Like individuals, and in comparison to non-profit organizations, municipal corporations are not required to pay any consideration for lands they receive.

Application of sec. 14(c) (3) to the Municipality of Anchorage is somewhat awkward, in that this provision of ANCSA appears to contemplate a situation in which the jurisdiction of the municipal corporation is roughly coincidental with the boundaries of the village, while the Village of Eklutna is but one of many communities now contained within the boundaries of the unified Municipality. As all parties agree, Congress did not expressly protect the interest of those municipal corporations somewhat unique to Alaska, borough governments, such as the Greater Anchorage Area Borough which preceded the present Municipality of Anchorage. ANCSA and its legislative history are virtually silent as to boroughs, and it is reasonable to conclude that Congress was, to a surprising degree, uninformed as to the existence and characteristics of these local government entities, and their possible relationship to such Native villages as might be located within their boundaries. Even in its concern for the effect of village selections of TA'd lands in urban areas, Congress appears to have contem-

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plated local city governments rather than larger municipal entities encompassing various communities over widespread geographical areas. (It may be noted that in the limited testimony in the record regarding Eklutna and Anchorage, Eklutna was referred to as "a suburb of" "26½ miles north of" Anchorage; the witnesses thus related Eklutna's location to that of the incorporated City of Anchorage, without regard to the fact that both Eklutna and the City of Anchorage were within the boundaries of the Greater Anchorage Area Borough.)

Congress clearly intended to benefit such municipal corporations as were providing needed government services in Native villages. Not only are conveyances to such corporations mandatory and without consideration, but a minimum of 1,280 acres must be conveyed regardless of the population of the village and, if no appropriate municipal corporation exists, this amount of land must be conveyed to the State in trust for any municipal corporation established in the village in the future.

The Board finds that the Municipality of Anchorage is the local government entity responsible for the community of Eklutna. The settlement or village of Eklutna has never been, and is not now, organized as a municipal corporation under the laws of Alaska. Separate municipal entities may not be incorporated within the boundaries of the unified Municipality of Anchorage. (See: A.S. 29.68.400 (1972)

and Anchorage Municipal Charter, Art. XIX, secs. 19.09(b), 19.16.) The Municipality of Anchorage is therefore the only local government available to Eklutna residents.

[24] The Board finds that the Municipality's interest is protected by sec. 14(c)(3) of ANCSA because the Municipality occupies the same position with regard to Eklutna as the local government entities envisioned by Congress in enacting such reconveyance provision and the disputed land, while outside Eklutna Village, is within the village withdrawal area and has been improved for a public purpose.

#### *Reconveyance to Municipality.*

Having found that the interest of the Municipality of Anchorage in the disputed lands is protected under sec. 14(c)(3) of ANCSA, the Board necessarily concludes that Eklutna, upon receipt of patent, will be required to convey the lands to the Municipality. Therefore, pursuant to 43 CFR sec. 2651.5, the Board hereby Orders that the Bureau of Land Management shall provide in the appropriate patent, conveying lands in village selection # AA-6661-A of Eklutna, Inc., for transfer of the surface estate of lots 5, 6, and 7 and that portion of the E½SW¼ west of the relocated Glenn Highway right-of-way in Sec. 19, T. 15 N., R. 1 W., Seward Meridian, to the Municipality of Anchorage. It is further Ordered that the acreage of the above-described lands, when estab-

lished, shall be credited as part of the acreage required by sec. 14 (c) to be transferred to the Municipality.

JUDITH M. BRADY, *Chairman.*

I Concur:

ABIGAIL F. DUNNING,  
*Member of the Board.*

#### MEMBER OF THE BOARD LAWRENCE A. MATSON, DIS- SENTING:

While I concur with my colleagues on the Board as to the status of the State's title to tentatively approved land selections prior to ANCSA, and as to the effect of ANCSA on the State's title, I disagree with their conclusion as to the status of the Municipality's interest under ANCSA. I agree that the State had not acquired equitable title to TA'd lands within village withdrawal areas and the Municipality as grantee of the State could not acquire better title than its grantor, sufficient to deprive Congress of the power to dispose of the land in settlement of Native claims. I agree that any protection or priority afforded the Municipality's interest in relation to Native selections of the disputed land must be a statutory right, conferred by ANCSA. However, I do not concur with the finding that Eklutna, Inc., is entitled to select the disputed lands and the Municipality is entitled merely to a reconveyance under sec. 14(c) (3). My reading of

the Act leads me to conclude that the lands in dispute are not available for selection by Eklutna, because they are excluded from the sec. 11(a) (2) withdrawal for selection by the Village Corporation.

At the outset, it must be recognized that ANCSA was a legislative settlement between three primary parties: the Natives of Alaska, the State of Alaska, and the Federal Government. While the interests of these three parties were most significantly affected, ANCSA peripherally affects the interests of numerous private individuals.

It is clear that Congress intended each Native Village Corporation to have the right to select up to 69,120 acres, or three townships, of lands tentatively approved to the State and located within its village withdrawal area as described in sec. 11 (a) (1). Congress also clearly contemplated that certain interests in the land would be protected from such selection, for withdrawals described in secs. 11(a) (1) and 11 (a) (2) are subject to valid existing rights. Congress apparently contemplated that at least some of these protected interests would have been created by the State; if this were not so, it would have been unnecessary for Congress in sec. 11 (a) (2) of ANCSA to prohibit the State's creation of such third-party interests, derived from the Statehood Act, in the future.

It seems unlikely that Congress was prepared to describe and specify in detail all the interests, created by the State or Federal gov-

ernments, which it sought to protect. Had it wished to, Congress could have defined, in Section 3, the classes of interests which were to be protected as "valid existing rights." I believe that the absence of such a definition was caused by design rather than by oversight. The term "valid existing rights" was deliberately left open to the broadest possible interpretation in order to safeguard all individual interests, other than those of the State and the Federal governments, of which Congress realized it might be unaware.

ANCSA provides various means for the protection of property interests created by the State and Federal government prior to ANCSA. As noted, withdrawals for village selection are directed in secs. 11(a)(1) and 11(a)(2) to be made "subject to valid existing rights." Sec. 14(g), quoted previously herein, recites generally that all conveyances under ANCSA are subject to valid existing rights. It then provides that if a lease, contract, permit, right-of-way or easement, including a lease under sec. 6(g) of the Statehood Act, has been issued on lands which are the subject of an ANCSA patent, the patent shall be subject to such interests and the patentee shall succeed to the interest of the lessor, contractor, or the like.

Sec. 14(g) does not determine what third party interests are protected and what interests are not. Rather, it outlines the manner in which a particular kind of third

party interest, specifically those of less than a fee simple nature, is protected. Such interests are included within the Native conveyance; they are, however, fully protected to the extent that interest was in existence on Dec. 18, 1971.

Sec. 22(b) protects the interest of lawful entrymen under the public land laws relating to homesteads, headquarters sites, trade and manufacturing sites, or small tract sites. It provides a means of protecting parties who have an interest of such a nature that they are or shall be entitled to receive a patent from the United States. As sec. 14(g) offers protection to third parties who have a less than fee interest (a lease, contract, permit for example), an interest which cannot ripen into a full fee interest, sec. 22(b) is designed to protect parties who have an interest which shall ripen into full legal title, the interest of lawful entrymen under numerous Federal public land law statutes.

Additional protective measures are contained in sec. 14(c) which requires Native Village Corporations, upon receipt of patent, to convey the surface estate in lands occupied and used for various purposes to the occupants and users thereof, without requiring any claim of title. Prospective recipients include individuals using lands as a primary place of residence, primary place of business, subsistence campsite, or headquarters for reindeer husbandry; non-profit organizations; any municipal corporation

in the Native village, for existing municipal improvements and for community expansion; and finally, State or local governments for purposes of airport expansion.

As Congress did not define the term, "valid existing rights," but left it open to interpretation, I conclude that the recitals of protected interests in secs. 14(c), 14(g), and 22(b) of ANCSA are illustrative rather than exclusive. Congress thus set forth three procedures by which individual interests in land might be protected from the adverse effects of a settlement between other parties; Congress left open the opportunity to adjudicate the type of protection most appropriate to such individual interests as might later be asserted.

As has been pointed out by Cook Inlet and Eklutna, ANCSA is virtually silent as to boroughs, as is the legislative history of the Act. The conclusion is unavoidable that Congress simply was not informed or aware of the existence or nature of borough governments, nor of how such governments' interests in land might be affected by ANCSA. Yet the interest of such governments is significant and not lightly to be forfeited.

Appellant's argument that only those State-created third party interests specifically enumerated in sec. 14(g) survive an 11(a)(2) withdrawal results in treating sec. 14(g) as a definition of State-created property interests. However, it must be pointed out that the withdrawal provisions which pro-

vide the only mechanism for village selection, withdrew land "subject to valid existing rights." The term is inclusive, and does not, of itself, exclude specific categories of property interests. In its common usage, it is included to denote protection of all property interests—in a less than fee status—which are subject to due process considerations. As I read them, secs. 14(g) and 22(b) in ANCSA are intended simply to specify procedures for the administrative treatment of property interests which would be protected in any case, rather than to create a substantive and exclusive right to protection.

Therefore, it is clear from a review of those sections of ANCSA concerned with third party interests that Congress intended to protect all rights derived from Federal or State law prior to ANCSA.

I conclude that while Congress intended, in sec. 11(a)(2), to divest the State of a portion of its tentatively approved lands in settlement of Native claims, Congress did not intend to divest holders of land or interests in land other than the State.

I believe that those sections of ANCSA concerned with due process rights prior to ANCSA, while illustrating Congressional intent to protect such rights, are chiefly intended to provide direction as to *how* such rights shall be protected. The manner of protection is summarized in regulations contained in 43 CFR 2650.3-1, issued under the authority of secs. 14(g) and 22(b)

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of ANCSA, which require the BLM to exclude from conveyance "any lawful entries or entries which have been perfected under, or are being maintained in compliance with, laws leading to the acquisition of title, but shall include land subject to valid existing rights of a temporary or limited nature such as those created by leases (including leases issued under sec. 6(g) of the Alaska Statehood Act), contracts, permits, rights-of-way, or easements."

Eklutna concedes that if the State had issued a patent to the Municipality, albeit prior to receipt of patent by the State, the Municipality's interest would clearly be protected as "valid existing right" under ANCSA.

I agree, while a State patent issued under these circumstances could not create in the grantee an interest greater than that of the State, such a patent would have conveyed all interest the State had. As between the State and its patentee, title would have passed to the latter. And while State patents of tentatively approved lands to a municipality are not interests specifically described in ANCSA, I conclude that they are interests tantamount to a patent which Congress intended to protect. They are protected for this reason, and also because, upon enactment of ANCSA, such interests had already passed from the State to its patentee. The patentee's title, like the State's, was until enactment of ANCSA, encumbered by Native

claims. However, such encumbrance was removed by the extinguishment of all aboriginal title mandated by sec. 4(a) of ANCSA.

Title having thus passed from the State prior to the enactment of ANCSA, the lands would not be vulnerable to withdrawal under sec. 11(a)(2), and the Municipality's interest is conditional only on final survey and issuance of patent as required by A.S. 29.18.90.

I believe that the interest of the Municipality in the present appeal must receive the same treatment. Having complied with A.S. 29.18.200, the Municipality appears to be entitled, under that Statute, to issuance of patent upon completing survey. Upon extinguishment of aboriginal claims by ANCSA, the State's interest was retroactively validated and retroactively perfected the Borough's selection. The Municipality's interest, therefore, was unavailable for selection by Eklutna as it would have been had the Municipality held a State patent. The lands in dispute, having been unavailable for selection, cannot be included in any conveyance to Eklutna, Inc.

I would not find, as BLM did, that the Municipality is protected by sec. 22(b) of ANSCA. The result is the same, however, in that an interest leading to patent, albeit created by the State rather than the Federal Government, is excluded from conveyance to a Native Corporation. The acreage of the lands is therefore not charged against the entitlement of Eklutna. As in sec.

22(b), an individual interest attaching to the land prior to passage of ANCSA rendered the land unavailable for selection.

LAWRENCE A. MATSON,  
*Member of the Board.*

## APPENDIX A

1. Treaty of Cession, Mar. 30, 1867, Art. III, 15 Stat. 539, 542.

*Rights of inhabitants of the ceded territory.*

The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion. The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.

2. Organic Act of May 17, 1884, sec. 8, 23 Stat. 24, 26.

That the said district of Alaska is hereby created a land district, and a United States land-office for said district is hereby located at Sitka. The commissioner provided for by this act to reside at Sitka shall be ex officio register of said land-office, and the clerk provided for by this act shall be ex officio receiver of public moneys and the marshal provided for by this act shall be ex officio surveyor-general of said district and the laws of the United States relating to mining claims, and the rights incident thereto, shall, from and after the passage of this act, be in full force and effect in said district,

under the administration thereof herein provided for, subject to such regulations as may be made by the Secretary of the Interior, approved by the President: *Provided*, That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress: *And provided further*. That parties who have located mines or mineral privileges therein under the laws of the United States applicable to the public domain, or who have occupied and improved or exercised acts of ownership over such claims, shall not be disturbed therein, but shall be allowed to perfect their title to such claims by payment as aforesaid: *And provided also*, That the land not exceeding six hundred and forty acres at any station now occupied as missionary stations among the Indian tribes in said section, with the improvements thereon erected by or for such societies, shall be continued in the occupancy of the several religious societies to which said missionary stations respectively belong until action by Congress. But nothing contained in this act shall be construed to put in force in said district the general land laws of the United States. [Italics supplied.]

3. Alaska Statehood Act, July 7, 1958, 72 Stat. 339.

### Sec. 4:

As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States

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in trust for said natives; that all such lands or other property belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation: *Provided*, That nothing contained in this Act shall recognize, deny, enlarge, impair, or otherwise affect any claim against the United States, and any such claim shall be governed by the laws of the United States applicable thereto; and nothing in this Act is intended or shall be construed as a finding, interpretation, or construction by the Congress that any law applicable thereto authorizes, establishes, recognizes, or confirms the validity or invalidity of any such claim, and the determination of the applicability or effect of any law to any such claim shall be unaffected by anything in this Act: *And provided further*, That no taxes shall be imposed by said State upon any lands or other property now owned or hereafter acquired by the United States or which, as hereinabove set forth, may belong to said natives, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation.

#### Sec. 6(b) :

The State of Alaska, in addition to any other grants made in this section, is hereby granted and shall be entitled to select, within twenty-five years after the admission of Alaska into the Union, not to exceed one hundred and two million five hundred and fifty thousand acres from the public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection: *Provided*, That nothing herein contained shall affect any valid existing claim, location, or entry under the laws of the United States, whether for home-

stead, mineral, right-of-way, or other purpose whatsoever, or shall affect the rights of any such owner, claimant, locator, or entryman to the full use and enjoyment of the lands so occupied: *And provided further*, That no selection hereunder shall be made in the area north and west of the line described in section 10 without approval of the President or his designated representative.

#### Sec. 6(g) :

Except as provided in subsec. (a), all lands granted in quantity to and authorized to be selected by the State of Alaska by this Act shall be selected in such manner as the laws of the State may provide, and in conformity with such regulations as the Secretary of the Interior may prescribe. All selections shall be made in reasonably compact tracts, taking into account the situation and potential uses of the lands involved, and each tract selected shall contain at least five thousand seven hundred and sixty acres unless isolated from other tracts open to selection. The authority to make selections shall never be alienated or bargained away, in whole or in part, by the State. Upon the revocation of any order of withdrawal in Alaska, the order of revocation shall provide for a period of not less than ninety days before the date on which it otherwise becomes effective, if subsequent to the admission of Alaska into the Union, during which period the State of Alaska shall have a preferred right of selection, subject to the requirements of this Act, except as against prior existing valid rights or as against equitable claims subject to allowance and confirmation. Such preferred right of selection shall have precedence over the preferred right of application created by sec. 4 of the Act of Sept. 27, 1944 (58 Stat. 748; 43 U.S.C., sec. 282), as now or hereafter amended, but not over other preference rights now conferred by law. Where any lands desired by the State are unsurveyed at the time of their selection, the Secretary of the Interior shall survey the exterior boundaries of the area requested

without any interior subdivision thereof and shall issue a patent for such selected area in terms of the exterior boundary survey; where any lands desired by the State are surveyed at the time of their selection, the boundaries of the area requested shall conform to the public land subdivisions established by the approval of the survey. All lands duly selected by the State of Alaska pursuant to this Act shall be patented to the State by the Secretary of the Interior. Following the selection of lands by the State and the tentative approval of such selection by the Secretary of the Interior or his designee, but prior to the issuance of final patent, the State is hereby authorized to execute conditional leases and to make conditional sales of such selected lands. As used in this subsection, the words "equitable claims subject to allowance and confirmation" include, without limitation, claims of holders of permits issued by the Department of Agriculture on lands eliminated from national forests, whose permits have been terminated only because of such elimination and who own valuable improvements on such lands.

4. Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1624 (Supp. IV, 1974), *as amended*, 89 Stat. 1145 (1976).

Sec. 3(e):

"Public lands" means all Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation, and (2) land selections of the State of Alaska which have been patented or tentatively approved under sec. 6(g) of the Alaska Statehood Act, as amended (72 Stat. 341, 77 Stat. 223), or identified for selection by the State prior to Jan. 17, 1969;

Sec. 4:

(a) All prior conveyances of public land and water areas in Alaska, or any

interest therein, pursuant to Federal law, and all tentative approvals pursuant to sec. 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.

(b) All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.

(c) All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished.

Sec. 11(a) (1):

The following public lands are withdrawn, subject to valid existing rights, from all forms of appropriation under the public land laws, including the mining and mineral leasing laws, and from selection under the Alaska Statehood Act, as amended:

(A) The lands in each township that encloses all or part of any Native village identified pursuant to subsection (b);

(B) The lands in each township that is contiguous to or corners on the township that encloses all or part of such Native village; and

(C) The lands in each township that is contiguous to or corners on a township containing lands withdrawn by paragraph (B) of this subsection.

Sec. 11(a) (2):

All lands located within the townships described in subsec. (a) (1) hereof that have been selected by, or tentatively approved to, but not yet patented to, the State under the Alaska Statehood Act are withdrawn, subject to valid existing rights, from all forms of appropriation

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under the public land laws, including the mining and mineral leasing laws, and from the creation of third party interests by the State under the Alaska Statehood Act.

#### Sec. 14(c):

Each patent issued pursuant to subsec. (a) and (b) shall be subject to the requirements of this subsec. Upon receipt of a patent or patents:

(1) the Village Corporation shall first convey to any Native or non-Native occupant, without consideration, title to the surface estate in the tract occupied as a primary place of residence, or as a primary place of business, or as a subsistence campsite, or as headquarters for reindeer husbandry;

(2) the Village Corporation shall then convey to the occupant, either without consideration or upon payment of an amount not in excess of fair market value, determined as of the date of initial occupancy and without regard to any improvements thereon, title to the surface estate in any tract occupied by a non-profit organization;

(3) the Village Corporation shall then convey to any Municipal Corporation in the Native village or to the State in trust for any Municipal Corporation established in the Native village in the future, title to the remaining surface estate of the improved land on which the Native village is located and as much additional land as is necessary for community expansion, and appropriate rights-of-way for public use, and other foreseeable community needs: *Provided*, That the amount of lands to be transferred to the Municipal Corporation or in trust shall be no less than 1,280 acres;

(4) the Village Corporation shall convey to the Federal Government, State or to the appropriate Municipal Corporation, title to the surface estate for existing airport sites, airway beacons, and other navigation aids, together with such additional acreage and/or easements as are necessary to provide related services

and to insure safe approaches to airport runways; and

(5) for a period of ten years after the date of enactment of this Act, the Regional Corporation shall be afforded the opportunity to review and render advice to the Village Corporations on all land sales, leases or other transactions prior to any final commitment.

#### Sec. 14(g):

All conveyances made pursuant to this Act shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this Act, a lease, contract, permit, right-of-way, or easement (including a lease issued under sec. 6(g) of the Alaska Statehood Act) has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him. Upon issuance of the patent, the patentee shall succeed and become entitled to any and all interests of the State or the United States as lessor, contractor, permitter, or grantor, in any such leases, contracts, permits, right-of-way, or easements covering the estate patented, and a lease issued under sec. 6(g) of the Alaska Statehood Act shall be treated for all purposes as though the patent had been issued to the State. The administration of such lease, contract, permit, right-of-way, or easement shall continue to be by the State or the United States, unless the agency responsible for administration waives administration. In the event that the patent does not cover all of the land embraced within any such lease, contract, permit, right-of-way, or easement, the patentee shall only be entitled to the proportionate amount of the revenues reserved under such lease, contract, permit, right-of-way, or easement by the State or the United States which results

from multiplying the total of such revenues by a fraction in which the numerator is the acreage of such lease, contract, permit, right-of-way, or easement which is included in the patent and the denominator is the total acreage contained in such lease, contract, permit, right-of-way, or easement.

### Sec. 22(b) :

The Secretary is directed to promptly issue patents to all persons who have made a lawful entry on the public lands in compliance with the public land laws for the purpose of gaining title to homesteads, headquarters sites, trade and manufacturing sites, or small tract sites [43 U.S.C. 682], and who have fulfilled all requirements of the law prerequisite to obtaining a patent. Any person who has made a lawful entry prior to Aug. 31, 1971, for any of the foregoing purposes shall be protected in his right of use and occupancy until all the requirements of law for a patent have been met even though the lands involved have been reserved or withdrawn in accordance with Public Land Order 4582, as amended, or the withdrawal provisions of this Act. *Provided*, That occupancy must have been maintained in accordance with the appropriate public land law: *Provided further*, That any person who entered on public lands in violation of Public Land Order 4582, as amended, shall gain no rights.

### 5. 43. CFR 2650.3-1 Lawful entries and lawful settlements.

(a) Pursuant to secs. 14(g) and 22(b) of the act, all conveyances issued under the act shall exclude any lawful entries or entries which have been perfected under, or are being maintained in compliance with, laws leading to the acquisition of title, but shall include land subject to valid existing rights of a temporary or limited nature such as those created by leases (including leases issued under sec. 6(g) of the Alaska Statehood Act), contracts, permits, rights-of-way, or easements.

(b) The right of use and occupancy of persons who initiated lawful settlement or entry of land, prior to Aug. 31, 1971, is protected: *Provided*, That:

(1) Occupancy has been or is being maintained in accordance with the appropriate public land law, and

(2) Settlement or entry was not in violation of Public Land Order No. 4582, as amended. Any person who entered or settled upon land in violation of that public land order has gained no rights.

(c) In the event land excluded from conveyance under paragraph (a) of this section reverts to the United States, the grantee or his successor in interest shall be afforded an opportunity to acquire such land by exchange pursuant to sec. 22(f) of the act.

### Sec. 2650.5-4 Village surveys.

(a) Only the exterior boundaries of contiguous entitlements for each village corporation will be surveyed. Where land within the outer perimeter of a selection is not selected, the boundaries along the area excluded shall be deemed exterior boundaries. The survey will be made after the total acreage entitlement of the village has been selected.

(b) Surveys will be made within the village corporation selections to delineate those tracts required by law to be conveyed by the village corporations pursuant to sec. 14(c) of the act.

(c) (1) The boundaries of the tracts described in paragraph (b) of this section shall be posted on the ground and shown on a map which has been approved in writing by the affected village corporation and submitted to the Bureau of Land Management. Conflicts arising among potential transferees identified in sec. 14(c) of the act, or between the village corporation and such transferees, will be resolved prior to submission of the map. Occupied lots to be surveyed will be those which were occupied as of Dec. 18, 1971.

(2) Lands shown by the records of the Bureau of Land Management as not having been conveyed to the village cor-

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poration will be excluded by adjustments on the map by the Bureau of Land Management. No surveys shall begin prior to final written approval of the map by the village corporation and the Bureau of Land Management. After such written approval, the map will constitute a plan of survey. Surveys will then be made in accordance with the plan of survey. No further changes will be made to accommodate additional sec. 14(c) transferees, and no additional survey work desired by the village corporation or municipality within the area covered by the plan of survey or immediately adjacent thereto will be performed by the Secretary.

#### Sec. 2651.4 Selection limitations.

(a) Each eligible village corporation may select the maximum surface acreage entitlement under secs. 12 (a) and (b) and sec. 16(b) of the act. Village corporations selecting lands under secs. 12 (a) and (b) may not select more than:

(1) 69,120 acres from land that, prior to Jan. 17, 1969, has been selected by, or tentatively approved to, but not yet patented to the State under the Alaska Statehood Act; and

(2) 69,120 acres of land from the National Wildlife Refuge System; and

(3) 69,120 acres of land from the National Forest System.

(b) To the extent necessary to obtain its entitlement, each eligible village corporation shall select all available lands within the township or townships within which all or part of the village is located, and shall complete its selection from among all other available lands. Selections shall be contiguous and, taking into account the situation and potential uses of the lands involved, the total area selected shall be reasonably compact, except where separated by lands which are unavailable for selection or a section in which a body of water comprises more than one-half of the total acreage of a section. The total area selected will not be considered to be reasonably compact if (1) it excludes other lands available for selection within its exterior bounda-

ries; or (2) lands which are similar in character to the village site or lands ordinarily used by the village inhabitants are disregarded in the selection process; or (3) an isolated tract of public land of less than 1,280 acres remains after selection.

(c) The lands selected under secs. 12 (a) or (b) shall be in whole sections where they are available, or shall include all available lands in less than whole secs., and, wherever feasible, shall be in units of not less than 1,280 acres. Lands selected under sec. 16(b) of the act shall conform to paragraph (b) of this section and shall conform as nearly as practicable to the U.S. land survey system.

(d) Village corporation selections within secs. 11 (a) (1) and (a) (3) areas shall be given priority over regional corporation selections for the same lands.

(e) Village or regional corporations are not required to select lands within an unpatented mining claim or millsite. Unpatented mining claims and millsites shall be deemed to be selected, unless they are excluded from the selection by metes and bounds or other suitable description and there is attached to the selection application a copy of the notice of location and any amendments thereto. If the village or regional corporation selection omits lands within an unpatented mining claim or millsite, this will not be construed as violating the requirements for compactness and contiguity. If, during the selection period, the excepted mining claims or millsites are declared invalid, or under the State of Alaska mining laws are determined to be abandoned, the selection will no longer be considered as compact and contiguous. The corporation shall be required to amend its selection, upon notice from the authorized officer of the Bureau of Land Management, to include the lands formerly included in the mining claim or millsite. If the corporation fails to amend its selection to include such lands, the selection may be rejected.

(f) Eligible village corporations may file applications in excess of their total

entitlement. To insure that a village acquires its selection in the order of its priorities, it should identify its choices numerically in the order it wishes them granted. Such selections must be filed not later than Dec. 18, 1974, as to sec. 12(a) or 16(b) selections and Dec. 18, 1975, as to sec. 12(b) selections.

(g) Whenever the Secretary determines that a dispute exists between villages over land selection rights, he shall accept, but not act on, selection applications from any party to the dispute until the dispute has been resolved in accordance with sec. 12(e) of the act.

(h) Village or regional corporations may, but are not required to, select lands within pending Native allotments. If the village or regional corporation selection omits lands within a pending Native allotment, this will not be construed as violating the requirements for compactness and contiguity. If, during the selection period, the pending Native allotment is finally rejected and closed, the village or regional corporation may amend its selection application to include all of the land formerly in the Native allotment application, but is not required to do so to meet the requirements for compactness and contiguity.

## GENERAL CRUDE OIL COMPANY

28 IBLA 214

Decided *December 10, 1976*

Appeal from decisions of the Colorado State Office, Bureau of Land Management, requiring that special stipulations be executed as a condition precedent to the issuance of 27 oil and gas leases (C-21484, etc.).

Affirmed as modified, and remanded.

### 1. Oil and Gas Leases: Stipulations

Applicants for oil and gas leases may be required to accept a stipulation as reasonable and in the public interest and in

accord with national and departmental policy, which stipulation requires lessees to engage the services of a qualified professional archaeologist to conduct a survey of the areas to be disturbed for evidences of archaeological or historic sites or materials with the cost to be borne by the lessees, but such archaeologist is not required to work only under the authority of a current Antiquities Act permit.

### 2. Patents of Public Lands: Effect—Statutes

The Bureau of Land Management has the authority to impose a stipulation on an oil and gas lease covering reserved minerals on patented lands, which would require archaeological investigation and excavations by lessee.

**APPEARANCES:** C. M. Peterson, Esq., Poulson, Odell & Peterson, Denver, Colorado, for appellant.

### OPINION BY ADMINISTRATIVE JUDGE LEWIS

#### INTERIOR BOARD OF LAND APPEALS

This is a consolidated appeal by General Crude Oil Company from five separate decisions of the Colorado State Office, Bureau of Land Management (BLM), involving the 27 oil and gas lease offers listed in Appendix A, attached hereto.

In the decisions below the Bureau of Land Management (BLM) required the execution of special stipulations as a condition precedent to the issuance of leases.<sup>1</sup> The stipu-

<sup>1</sup> Two of the offers—C-21484 and C-21504—were partially rejected as to certain described lands because the United States owns no interest in the minerals therein. See Appendix A, p. 675. As these were not mentioned in the statement of reasons for appeal, the partial rejections have become final.

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lations are set forth on Form CSO 3100-7 (Nov. 1974) and consist of the standard Surface Disturbance Stipulations, which are in accord with BLM Form 3109-5 (May 1973), and contain an added section entitled "5. Protection of Cultural Resources." Appellant has indicated that it has no objection to the Surface Disturbance Stipulations but it appeals from the requirement that it execute that portion of the stipulation which is entitled "Protection of Cultural Resources." This reads:

#### 5. *Protection of Cultural Resources*

A. Prior to undertaking any ground disturbing activities on lands covered under the provisions of this lease, the lessee shall:

1. Engage the services of a qualified professional archeologist to conduct a thorough and complete survey of areas to be disturbed for evidences of archeological or historic sites or materials. Said archeologist shall work only under the authority of a current Antiquities Act permit, applicable to the area to be investigated.

2. Provide the lessor sufficient time to review documentary evidence that a survey as required by (1) above, has been performed. This evidence shall be in the form of a report from the archeologist and shall cover, at a minimum: citation of permit authority, location of area(s) surveyed, methods employed, report of findings, conclusions/recommendations.

3. Follow the requirements set forth by the lessor concerning protection, preservation, or disposition of any sites or material discovered. In cases where salvage excavation is necessary, the cost of such excavations shall be borne by the lessee.

B. After undertaking ground disturbing activities, the lessee shall insure compliance with those portions of Section 2(q) of the basic lease terms that require

reporting and protection of materials of scientific or historic interests encountered during performance of lease.<sup>2</sup>

In its statement of reasons appellant states it objects to the portion of the stipulation dealing with the protection of cultural resources on the ground that this part of the stipulation goes beyond anything required by the statutes or regulations and requires the lessee not only to protect the cultural resources but also to locate them. Appellant further asserts that this portion of the stipulation is not supported by any showing that cultural resources are located on the land or that if they are located on the lands they are of sufficient value to warrant the imposition of the stipulation. Appellant contends compliance with the stipulation would require considerable time and expense on the part of the oil and gas lessee, which may have no relationship to the probability of the location of a site on the lease lands, including the requirement that lessee must engage the services of a qualified professional archeologist; also, that the institution with which the archeologist is associated must then obtain an Antiquities Act permit from Washington, D.C., to carry out a thorough and complete survey of

<sup>2</sup> In transmitting the appeals to this Board, BLM stated:

"On Nov. 15, 1974, new Archeological stipulations were added to the standard Surface Disturbance Stipulations (Form CSO 3100-7). A notice was posted in the Public Room of the Colorado State Office that on all offers filed after Dec. 1, 1974, the new stipulations would automatically become a part of the lease. However, on offers filed prior to Dec. 1, 1974, the stipulations are sent to the offeror for execution and return."

the areas to be disturbed; and, finally that the stipulation is unreasonable as lessee could not comply with it relative to patented land and it is not required for protection of such patented lands. The appellant in essence raises two questions: (1) whether the stipulation is a valid and reasonable requirement, and (2) if valid and reasonable, it is properly applicable to patented lands.

Each case file herein contains a copy of an Environmental Report Face Sheet which indicates that no "102 statement" is required under the National Environmental Policy Act.<sup>3</sup> Appellant states that the Face Sheet

\* \* \* also reflects that an umbrella Environmental Analysis Report No. 050-74-16 dated Nov. 13, 1973, was prepared by the Canon City District Office of the Bureau of Land Management which covers the environmental effect of oil and gas operations in the San Luis Valley Area. This report at page 13 contains a statement that the valley floor has numerous historical sites and the foothills and mountains have historical and archeological sites and maps showing historical and archeological sites and trails are on file in the Canon City District Office; however, there is no indication on the Environmental Report Face Sheet that such sites are located on the lands covered by the subject oil and gas lease applications.

[1] This Board has upheld as reasonable a stipulation providing for a survey of historical and archeological sites to be performed by an

oil and gas lessee at his own cost prior to entry upon the leased lands for purposes of exploration or drilling, where the survey is restricted to those areas which lessee proposes to enter, the protection of such sites is authorized by statute, and the stipulation does not substantially abridge the lessee's rights under the lease. *W. E. Haley*, 25 IBLA 311 (1976).

It is stated in this case that:

Sec. 2 of the Antiquities Act of June 8, 1906, 16 U.S.C. § 431 (1970), authorizes the creation of national monuments centered around "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States."

It is further provided in § 1 of the Historic Sites Act of Aug. 21, 1955, 16 U.S.C. § 461 (1970), that there is a national policy "to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States." The Secretary of the Interior is authorized under the Act to make a survey of historic sites, buildings, and objects and to restore and preserve them. 16 U.S.C. § 462 (1970). The Secretary may seek the assistance of other federal departments in administering the Act. 16 U.S.C. § 464 (1970).

\* \* \* \* \*

The fact that the lessee may have to bear the cost of the inventory does not make the stipulation objectionable. This Board has previously held that the financial burden of complying with protective stipulations in oil and gas leases is the sole responsibility of the lessee. *Bill J. Maddox*, 24 IBLA 147, 150 (1976).

The statutes referred to above establish the authority for the protection of archeological and historical sites and objects in the public interest. The stipula-

<sup>3</sup> This refers to environmental impact statements required by sec. 102 of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (1970).

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tion in this case appears both necessary and appropriate to avoid inadvertent destruction of such sites or objects. For these reasons, we find that the stipulation involved here is a reasonable one which should be upheld in the public interest.

Similarly, this Board in *Cecil A. Walker*, 26 IBLA 71 (1976),<sup>4</sup> upheld a stipulation in an oil and gas lease whereby, at the cost of the lessee, he had to engage a qualified archeologist to survey and salvage in advance of any operations archeological values on the lands involved. The stipulation set forth at 26 IBLA 72-73 read:

To secure specific compliance with the stipulations under Sec. 2, paragraph (q) of the oil and gas lease form, the lessee shall, prior to operations, furnish to the Authorized Officer a certified statement that either no archaeological values exist or that they may exist on the leased lands to the best of the lessee's knowledge and belief and that they might be impaired by oil and gas operations. Such certified statement must be completed by a qualified archaeologist acceptable to the Authorized Officer.

If the lessee furnishes a statement that archaeological values may exist where the land is to be disturbed or occupied, the lessee will engage a qualified archaeologist, acceptable to the Authorized Officer, to survey and salvage, in advance of any operations, such archaeological values on the lands involved. The responsibility for the cost for the certificate, survey and salvage will be borne by the lessee, and such salvaged property shall remain the property of the lessor or the surface owner.

This stipulation was to be used in every oil and gas lease issued in the Elko District in Nevada. The stip-

ulation was to supplement clause 2(q) of the standard oil and gas lease form, which provides in part as follows: [quoted in full below.]

When American antiquities or other objects of historic or scientific interest including but not limited to historic or prehistoric ruins, fossils or artifacts are discovered in the performances of this lease, the item(s) or condition(s) will be left intact and immediately brought to the attention of the contracting officer or his authorized representative.

The *Walker* case, *supra*, at 74-76 states:

\* \* \* it is well established that the Secretary of the Interior may require an applicant for an oil and gas lease to accept stipulations reasonably designed to protect environmental and other land values as a condition precedent to the issuance of a lease. *W. E. Haley*, 25 IBLA 311 (1976); *Earl R. Wilson*, 21 IBLA 392 (1975); *Richard P. Cullen*, 18 IBLA 414 (1975); *W. T. Stalls*, 18 IBLA 34 (1974); *Duncan Miller*, 16 IBLA 349 (1974); 43 CFR 3109.2-1. The need for the stipulation should be clear and the stipulation should be a reasonable means to the intended purpose. *Earl R. Wilson*, *supra*.

Several statutes establish the authority for the Department's involvement in the protection of archaeological values.<sup>5</sup> We find one statute especially pertinent to the issues raised in the instant case.

The Act of June 27, 1960, 74 Stat. 220, provided for "the preservation of historical and archeological data which might otherwise be lost as a result of the construction of a dam." In 1974, the scope of the Act was broadened to cover "any alteration of the terrain caused as a result of any Federal construction project or

<sup>4</sup> See also *C. C. Hughes*, 27 IBLA 38 (1976), which follows the *Haley* and *Walker* cases.

<sup>5</sup> See e.g., the Antiquities Act of June 8, 1906, 16 U.S.C. §§ 431, 432 (1970); The Historic Sites Act, as amended, 16 U.S.C. §§ 461-467 (1970); and Pub. L. 86-523, as amended, 16 U.S.C. §§ 469-469c (Supp. IV, 1974).

federally licensed activity or program." Act of May 24, 1974, 88 Stat 174, 16 U.S.C. § 469 (Supp. IV, 1974). The 1974 amendments direct any federal agency to notify the Secretary of the Interior whenever it becomes aware that its activities "in connection with any Federal construction project or any federally licensed project, activity, or program may cause irreparable loss or destruction of significant scientific, prehistorical, historical, or archeological data." 16 U.S.C. § 469a-1(a) (Supp. IV, 1974).

16 U.S.C. § 469a-2(a) (Supp. IV, 1974) describes the Secretary's responsibilities when notified of a possible loss or destruction of archaeological data:

The Secretary, upon notification, in writing by any Federal or State agency or appropriate historical or archeological authority that scientific, prehistorical, historical, or archeological data is being or may be irrevocably lost or destroyed by any Federal or federally assisted or licensed project, activity, or program, shall, if he determines that such data is significant and is being or may be irrevocably lost or destroyed and after reasonable notice to the agency responsible for funding or licensing such project, activity, or program, conduct or cause to be conducted a survey and other investigation of the areas which are or may be affected and recover and preserve such data (including analysis and publication) which, in his opinion, are not being, but should be, recovered and preserved in the public interest.

The broad language of the statute is sufficient to indicate a Congressional desire to preserve archaeological values from surface disturbing activities conducted under federal oil and gas leases.<sup>6</sup> The pivotal issue is whether it is reason-

able to require a qualified archaeologist to inspect a site prior to surface disturbing activities despite the fact that any archaeological values that may exist on the site have yet to be discovered. We find that the legislative history of the 1974 amendment to that statute indicates a Congressional intent to protect values which have yet to be discovered as well as values which are already known. [See the *Walker* case, *supra*, at pages 75 and 76 for a detailed discussion of the legislative history.]

The *Walker* case, *supra*, at 76-77 further holds:

\* \* \* To the extent that any prior decisions may be interpreted as requiring a showing of known archaeological values before a special stipulation will be approved, *e.g.*, *Earl L. Wilson*, *supra*, those decisions are hereby modified. See also *Bill J. Maddox*, 22 IBLA 97 (1975).

In *Walker* the Board distinguished the *Earl R. Wilson* case, where the stipulation requiring an archeological inventory was held unreasonable. The Board said in *Wilson* it was not clear *when* the surface management agency could conduct the survey, and because the stipulation would have prohibited entry until a survey was conducted, the Board conceived the possibility that a lessee might never be authorized to enter the lease. That is not the case where the stipulations have been upheld, for example, in *Haley*, *supra*; *Walker*, *supra*. That also is not true of the instant case,

<sup>6</sup> The House Report contained the following statement concerning the broadened scope of the amendments:

"Public Law 86-523, as an extension of the Historic Sites Act of 1935, declared that where the construction of Federal or Federally licensed dams, reservoirs and related activities might result in the loss of historical or archeological data, it should be the policy

to preserve and recover such information. As recommended, this legislation broadens that policy to include any Federal or federally assisted construction projects involving the alteration of the terrain, as well as other Federally licensed projects, or Federal activities or programs which might disrupt such values. House Report No. 93-992, 1974 U.S. Code Cong. & Ad. News, p. 3172:

*General Crude*. It was found in the *Walker* case, as in *Haley*, that the oil and gas lessee must bear the expense of compliance with a reasonable archeological stipulation.

The stipulation in the instant case appears to be on all fours with the *Haley* and *Walker* cases with one exception. In the instant case, unlike the other two, the archeologist must "work only under the authority of a current Antiquities Act permit, applicable to the area to be investigated." We do not find in the other cases that the Board required an Antiquities Act permit. *Haley, supra; Walker, supra*. Moreover, we find no such requirement in the standard oil and gas lease form (sec. 2(q)), in the standard geothermal lease, or in the standard coal lease form, quoted in full below in footnotes 4, 5, and 6. We find no situation in which the requirement that the archaeologist work under an Antiquities Act permit is required and that such requirement has been officially approved by the Department of the Interior. On the face of it, such a requirement seems burdensome to the lessee and not necessary for the protection of archaeological values by the Department. Accordingly, we find the stipulation in the instant case reasonable with the exception of the requirement for the permit. We therefore affirm the requirement by BLM for the stipulation herein with (1) the deletion from the first paragraph the last three lines "Said archaeologist shall work only under the authority of a current Antiquities Act permit,

applicable to the area to be investigated"; and (2) the deletion from paragraph 2, line 6, the words "citation of permit authority."

[2] The second issue herein is whether the stipulation is properly applicable to patented land in which the United States has reserved the minerals.

It is clearly the policy of Congress, and, therefore, of the United States, to protect antiquities and archaeological values, as is seen from the following. Thus, the American Antiquities Act of 1906, 16 U.S.C. § 431 *et seq.* (1970), provides that any person who shall injure or destroy any historic or prehistoric ruin or object of antiquity shall upon conviction be fined the sum of not more than \$500 or be imprisoned for a period of not more than 90 days and provides for the granting of permits to qualified institutions to examine ruins, excavate archaeological sites and gather the objects of antiquities on lands owned or controlled by the United States. Also the Historic Sites Act of 1935, 16 U.S.C. § 461 *et seq.* (1970), declares that it shall be a national policy to preserve for use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States. Sec. 462 provides that the Secretary of the Interior, through the National Park Service, shall have the duty to make a survey of historic and archaeological sites, make investigations and researches relating to particular sites, buildings or objects, to

obtain true and accurate historical and archaeological facts and information concerning the same, to restore, reconstruct, rehabilitate, preserve and maintain historic and prehistoric sites, buildings, objects and properties of national historic or archaeological significance, and adopt rules and regulations necessary to carry out the provisions of the Act.

The Act for the Protection and Enhancement of the Cultural Environment of 1966, 16 U.S.C. § 470 (1970), contains the declaration by Congress that the historical and cultural foundations of the nation should be preserved as a living part of community life and development in order to give a sense of orientation to the American people, and authorizes the Secretary of the Interior to expand and maintain a national register of districts, sites, buildings, structures and objects of significance in American history, architecture, archaeology and culture, to be called the "National Register." The Act provides for establishment of an Advisory Counsel on Historic Preservation, whose regulations are contained in 36 CFR 800, 39 FR 6104, Feb. 19, 1974, and a primary concern with properties which may be suitable for inclusion in the National Register of Historic Places. The National Environmental Protection Act, 1969, 42 U.S.C. 4331(b)(4) (1970), provides that it is the responsibility of the Federal Government to preserve important historic, cultural and natural aspects of our national heritage.

Executive Order No. 11593 of May 31, 1971, was issued in further-

ance of the purposes of the National Environmental Policy Act of 1969, the National Historic Preservation Act of 1966, the Historic Sites Act of 1935 and the Antiquities Act of 1906. It provides that the Federal government shall provide leadership in preserving, restoring and maintaining the historical and cultural environment of the nation, and that by July 1, 1973, federal agencies shall locate, inventory and nominate to the Secretary of the Interior all sites, buildings, districts and objects under their jurisdiction or control appear justified for listing in the National Register of Historic Places. The Archaeological and Historical Data Conservation Act of 1974, 88 Stat. 174, 16 U.S.C.A. § 469 (1974), amended the Reservoir Salvage Act of 1960, 74 Stat. 220, to provide for preservation of historical or archaeological data and relies which might be destroyed in reservoir construction and flooding by dams constructed under federal license or permit.

The above laws and regulations establish beyond doubt that it is the policy of the United States to protect archaeological values.

As to the position of the Department on the preservation of archaeological values, the standard lease form for oil and gas,<sup>7</sup>

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<sup>7</sup> Oil and gas standard lease form provides in part:

"Sec. 2(q) *Protection of surface, natural resources, and improvements.* To take such reasonable steps as may be needed to prevent operations on the leased lands from unnecessarily: (1) causing or contributing to soil erosion or damaging crops, including forage, and timber growth thereon or on Federal or non-Federal lands in the vicinity; (2) polluting air and water; (3) damaging improve-

coal,<sup>8</sup> and geothermal steam<sup>9</sup> specifically require the protection and preservation of archaeological val-

ments owned by the United States or other parties; or (4) destroying, damaging or removing fossils, historic or prehistoric ruins, or artifacts and upon any partial or total relinquishment or the cancellation or expiration of this lease, or at any other time prior thereto when required and to the extent deemed necessary by the lessor to fill any pits, ditches or other excavations, remove or cover all debris, and so far as reasonably possible, restore the surface of the leased land and access roads to their former condition, including the removal of structures as and if required. The lessor may prescribe the steps to be taken and restoration to be made with respect to the leased lands and improvements thereon *whether or not owned by the United States*. When American antiquities or other objects of historic or scientific interest including but not limited to historic or prehistoric ruins, fossils or artifacts are discovered in the performance of this lease, the item(s) or condition(s) will be left intact and immediately brought to the attention of the contracting officer or his authorized representative. [Italics supplied.]

<sup>8</sup> Sec. 15 of the standard coal lease form reads:

"SEC. 15. *Antiquities and Objects of Historic and Scientific Value.*

(A) 'Cultural resources' for the purpose of this section shall be defined as any district, site, building, structure, or object of American historical, scientific prehistoric, archeological, or architectural significance. Prior to the submission of any exploration or mining plan, the Lessee shall engage a qualified independent expert who shall conduct a survey, acceptable to the District Manager, of the lands to be disturbed under that plan and immediately adjoining lands to determine the existence of cultural resources. (Information collected prior to the Effective Date as to cultural resources on the Leased Lands shall, with the approval of the District Manager, satisfy all or part of the Survey requirements of this section.) The expert conducting the survey shall be a person acceptable to the District Manager and the terms and conditions of the contract under which the survey is conducted shall be subject to approval of the District Manager. The contract shall provide that the expert shall be directly responsible to the Lessor, and the Lessor shall, upon approval of the contract, become a party thereto. The District Manager shall approve (or disapprove as the case may be) the contract not later than 30 days after the Lessee submits the contract to him. The survey, at the discretion of the Lessee, may be in two parts, one covering the lands which are the subject of the exploration plan and one covering the lands

ues. The *Haley* and *Walker* cases discussed above also show the Departmental policy is to protect and preserve archaeological values.

which are the subject of the mining plan, or may be in one part including the lands which are the subject of both the exploration plan and the mining plan. The responsibility and cost of the survey and of any salvage that may be required as a result of such survey will be that of the Lessee. No plan in connection with which a survey is prepared shall be approved before the expert has completed a survey acceptable to the District Manager. In order that the requirements of this section may be expeditiously fulfilled, the Lessee may elect to have the expert on hand during exploration or mining to complete the necessary survey of additional lands not covered by the initial survey before those lands are disturbed pursuant to changes which the Mining Supervisor approves in the exploration or mining plan. In the event that the survey identifies cultural resources, the plan shall contain provisions to avoid the disturbance of such discoveries until the Lessee and the Lessor have complied with the law with respect to such discoveries.

"(B) The Lessee shall immediately bring to the attention of the Mining Supervisor any cultural resources discovered as a result of operations under this Lease and shall lease such discoveries intact. The Mining Supervisor shall immediately inform the District Manager of the discovery and the District Manager shall, within ten days thereafter, evaluate the discoveries brought to his attention to determine whether such discoveries may be potentially qualified for inclusion in the National Register of Historic Places or may be otherwise significant as a cultural resource. If the District Manager shall make such determination in the affirmative, he shall immediately refer this determination to the appropriate officer of the Department of the Interior for review and approval of potential qualification, which shall be made within 10 days thereafter. During this period for determination and evaluation of the discovery, the Lessee shall comply with the directions of the District Manager so as to avoid the disturbance of the cultural resource."

<sup>9</sup> Secs. 14 and 18 of the standard geothermal lease form read:

"Sec. 14. PROTECTION OF THE ENVIRONMENT (LAND, AIR AND WATER) AND IMPROVEMENTS.—The Lessee shall take all mitigating actions required by the Lessor to prevent: (a) soil erosion or damage to crops or other vegetative cover on Federal or non-Federal lands in the vicinity; (b) the pollution of land, air or water; (c) land subsidence, seismic activity, or noise emissions; (d) damage to aesthetic and recreational values; (e)

(Continued)

When the Government retains the mineral rights in land, although it does not own the surface, the Government has the authority to go on the land to the extent necessary to extract the minerals. As a corollary

(Continued)

damage to fish or wildlife or their habitats; (f) damage to or removal of improvements owned by the United States or other parties; or (g) damage to or destruction or loss of fossils, historic or prehistoric ruins, or artifacts. Prior to the termination of bond liability or at any other time when required and to the extent deemed necessary by the Lessor, the Lessee shall reclaim all surface disturbances as required, remove or cover all debris or solid waste, and, so far as possible, repair the offsite and onsite damage caused by his activity or activities incidental thereto, and return access roads or trails and the leased lands to an acceptable condition including the removal of structures, if required. The Supervisor or the Authorized Officer shall prescribe the steps to be taken by Lessee to protect the surface and the environment and for the restoration of the leased lands and other lands affected by operations on the leased lands and improvements thereon, whether or not the improvements are owned by the United States. Timber or mineral materials may be obtained only on terms and conditions imposed by the Authorized Officer.

"Sec. 18. ANTIQUITIES AND OBJECTS OF HISTORIC VALUE—The Lessee shall immediately bring to the attention of the Authorized Officer any antiquities or other objects of historic or scientific interest, including but not limited to historic or prehistoric ruins, fossils, or artifacts discovered as a result of operations under this lease, and shall leave such discoveries intact. Failure to comply with any of the terms and conditions imposed by the Authorized Officer with regard to the preservation of antiquities may constitute a violation of the Antiquities Act (16 U.S.C. 431-433). Prior to operations, the Lessee shall furnish to the Authorized Officer a certified statement that either no archaeological values exist or that they may exist on the leased lands to the best of the [sic] Lessee's knowledge and belief and that they might be impaired by geothermal operations. If the Lessee furnishes a statement that archaeological values may exist where the land is to be disturbed or occupied, the Lessee will engage a qualified archaeologist, acceptable to the Authorized Officer, to survey and salvage, in advance of any operations, such archaeological values on the lands involved. The responsibility for the cost for the certificate, survey, and salvage will be borne by the Lessee, and such salvaged property shall remain the property of the Lessor or the surface owner."

to this authority, the Government has the duty not to destroy any object or property not necessary to the extraction of the mineral. For the Government to satisfy its duty not to damage the surface unnecessarily, it must be able to ask an expert to appraise conditions and advise it accordingly. The Government in leasing the lands to another, may pass on to the lessee its authority to remove the minerals and its duty not to damage the surface and objects on the surface, and the duty to engage the services of an expert to advise it how not to damage the surface.

From the above discussion of statutes, departmental cases, and departmental lease forms for geothermal steam, oil and gas, and coal, it is clear there is a national and a departmental policy to protect archaeological values.

Further, it is noted that sec. 2(q) of the standard oil and gas lease form requires the restoration of the leased land to its former condition, *whether or not the land is owned by the United States*. In *The Montana Power Company*, 72 I.D. 518 (1965), the Secretary of the Department upheld the requirement in a coal lease to the effect that the lessee had to restore the surface of the leased land to its former condition even though the land in question was not owned by the United States.

The only logical conclusion from the foregoing is that the Government, which has a mineral right in patented land, has the authority to go on that land to retrieve the mineral; to retrieve the mineral in

such a way that it does not unnecessarily damage the surface, including articles of value on the surface; that it can sell the mineral to another; and that it can give these concomitant rights with the mineral to another—to retrieve the mineral and to do so in such a way that it does not damage the surface unnecessarily. Accordingly, for these reasons and in view of the national and departmental policy to protect archaeological values, we find that the stipulation herein, with the special Antiquities Act permit requirement deleted, is properly applicable to patented land.

The request for an oral argument is denied.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is herein affirmed as modified above, and the case is remanded for the amended stipulation to be presented to the lessee for his agreement.

ANNE POINDEXTER LEWIS,  
*Administrative Judge.*

WE CONCUR:

NEWTON FRISHBERG,  
*Chief Administrative Judge.*

MARTIN RITVO,  
*Administrative Judge.*

JOAN B. THOMPSON,  
*Administrative Judge.*

JOSEPH W. GOSS,  
*Administrative Judge.*

# APPENDIX A

IBLA Docket No.	Lease Offer No.	Date of BLM Decision
75-264	C-21484*	Nov. 20, 1974
75-264	C-21485	Do.
	C-21493	Do.
	C-21516	Do.
	C-21517	Do.
75-293	C-21482	Dec. 30, 1974
75-304	C-20927	Dec. 30, 1974
	C-20928	Do.
	C-20929	Do.
	C-20930	Do.
	C-21466	Do.
	C-21468	Do.
	C-21469	Do.
	C-21472	Do.
	C-21495	Do.
	C-21496	Do.
	C-21497	Do.
	C-21498	Do.
	C-21499	Do.
	C-21500	Do.
	C-21501	Do.
	C-21502	Do.
	C-21513	Do.
	C-21514	Do.
	C-21518	Do.
	C-21519	Do.
75-304	C-21504 *	Do.

\*Offers C-21484 and C-21504 were each rejected in part as to certain lands in which the United States owns no interest in the minerals therein.

## ADMINISTRATIVE JUDGE STUEBING DISSENTING IN PART:

I am seriously concerned by what I perceive to be the fundamental error of the majority in affirming the application of the subject stipulation to leases of reserved minerals on patented lands. My opposition to this use of the stipulation does not ignore its high-minded intent, and I readily acknowledge

that it is the declared policy of the United States and of this Department to protect archaeological values. Moreover, I recognize that the stipulation at issue has been devised in an effort to implement that policy.

Any endeavor to preserve valuable links with the past may boast a laudable purpose. But the means of achieving that purpose must be legal, reasonable and susceptible of accomplishment.

Where lands have been patented with a reservation of minerals to the United States, it is the *landowner* who owns the bones, fossils, artifacts and items of historic or anthropological interest,<sup>1</sup> as well as the sites of any historic event, or any alteration or improvement of the land which would form a part of the real estate.

Although the United States has reserved "all the minerals in said lands and the right to prospect for and remove the same,"<sup>2</sup> the United States has no right to enter upon the land for any purpose not directly referable to mineral exploration and production. It has recently been held that patents granted under the Stockraising Homestead Act with a reservation of the minerals to the United States did not establish two separate estates, the surface estate passing to the patentee and the subsurface or mineral estate being reserved to the United States; rather

what passed by such patent was fee title, not just the surface estate with a reservation of the subsurface. *United States v. Union Oil of California*, 369 F. Supp. 1289 (D. Calif. 1973).<sup>3</sup> Therefore, the United States may not invest its mineral lessee with the authority to engage in nonmineral pursuits on private land under the aegis of an oil and gas lease.

Archaeological investigations, excavations and salvage are as unrelated to mineral production as are investigations of the flora and fauna, or the scenic and recreational values which exist on private land and which may be imperiled by a program of mineral development. Just as the landowner might bar the entry of botanists, wildlife biologists and recreation specialists, he may bar archaeologists from his land.

In compelling the oil and gas lessee to accept this stipulation as a condition to receiving its lease and thereafter to comply with its provisions as a prerequisite to its mineral operations on the leasehold, the government is requiring the lessee to agree to do something that is beyond the legal authority of either the government or the lessee. Neither party to the lease has the power to force the landowner to allow archaeologists to enter upon the land for the purpose of conducting archaeological survey and salvage operations, because both the land and the relics, if any, are the private property of the landowner.

<sup>1</sup> It is basic to both English and American jurisprudence that such property belongs to the owner of the *locus in quo*. See, e.g., *Allred v. Biegel*, 219 SW 2d 665 (Mo. 1949), determining ownership of an ancient Indian canoe.

<sup>2</sup> Stockraising Homestead Act of Dec. 29, 1916; 43 U.S.C. § 291 (1970).

<sup>3</sup> Appeal pending.

*December 10, 1976*

To keep a proper perspective, we must bear in mind that the owner of the land which is subject to a federal reservation of all minerals will generally not favor the prospect of his land being entered and developed. The landowner will not share in any of the rents or royalties deriving from the mineral lease, but he will frequently feel threatened or discommoded by the anticipated arrival of seismic crews, road builders, drilling crews, and the installation of drilling rigs, pumping stations, tank batteries, sump pits, etc. He will not be compensated for noise, dust, odors, the departure of game, or the altered behavior of his cows, chickens or the family dog. He will be very likely to regard the proposed operation of the lessee as a most unwelcome intrusion which he would enthusiastically prevent if he had the means.

Accommodatingly, the majority has provided the owner with the means to exclude all surface occupancy of his lands. All he need do is say "No" when requested to admit the archaeologists. Thus the will of the Congress in carefully reserving valuable mineral deposits to the use and benefit of the American people can be frustrated by concern for the preservation of some privately owned archaeological values which are most probably nonexistent in any given instance.

It is not my thesis that the imposition of the stipulation is illegal. Many kinds of contracts are made contingent upon the occurrence of

some event or subject to the approval of some third person over which the contracting parties have no control. Theater owner A might contract to rent his hall to impresario B, subject to the approval of concert master C. Or X might contract to sell his house to Y, contingent upon Y's securing a loan commitment for a given sum on certain specified terms.

The difference between the foregoing examples and what is contemplated here is that contracts of the type exemplified above generally make provision for the nonoccurrence of the contingency which is under third-party control. Usually in such cases the contract will be rescinded or voided by its own terms. But in the case at bar the lessee's only option is to relinquish the lease and accept his loss. Presumably, the United States will again issue the lease to another lessee, impose the same stipulation, and the same landowner will again say the same thing to the new lessee, who will then be obliged to absorb his loss, and so on.

Of course there are other options open to the lessee. He could undertake to deceive the landowner as to the archaeologist's identity and purpose, perhaps passing him off as a member of the survey crew. Or the lessee could attempt to pay off the landowner in an amount sufficient to purchase his acquiescence. Or the lessee could burden the landowner with litigation or the threat of litigation in an effort to coerce his agreement. However, in my view

the Government should not be in the position of having created the climate for these kinds of recourse.

Also, there are significant questions which arise from the complex common law of contracts relating to recovery where performance is impossible, and the extent to which the rights of the parties may be altered where one party assumes the risk of impossibility. See Williston and Thompson, *Selections from Williston on Contracts* (Rev. Ed.) §§ 1972-74; *Restatement of Contracts* §§ 456, 457, 468. However, I will not address these questions here.

The majority cites *The Montana Power Company*, 72 I.D. 518 (1965). In that case the Department had imposed a requirement for surface restoration in a coal lease of privately owned lands containing coal deposits which were federally owned. The lessee, Montana Power Company, argued that the lands were of low value, suitable only for grazing, and the cost of restoration would exceed the value of the land. Moreover, the owner of the land, Northern Pacific Railway, was apparently unconcerned and waived its right to have the land restored. Nevertheless, Secretary Udall ruled that the lease requirement must be complied with. However, it is my opinion that if Northern Pacific Railway had actively opposed the restoration instead of merely indicating indifference, the United States could not have compelled the owner to accept the Government's concept of restoration. To illustrate this, let us assume that a coal com-

pany held a federal coal lease on a tract of typical prairie land in Nebraska. After completion of its operation the spoil bank formed a low, stable hill with a road to the crest, and the open pit filled with water to form a small lake. The landowner perceives that with a little work the hill would make an attractive home-site, and he is delighted with the altered condition of his land. Could the United States force its lessee to "restore" the land by using the spoil to fill the pit, destroying the hill and the lake over the vehement objections of the landowner? I believe the owner would encounter no difficulty in securing a permanent injunction against any such exercise of dominion over his land. Accordingly, I regard the majority's reliance on *Montana Power Company*, as misplaced.

For the same reason I do not believe that sec. 2(q) of the standard oil and gas lease form (or any similar provision in any other lease form) is efficacious to the extent that it provides:

\* \* \* The lessor may prescribe the steps to be taken and restoration to be made with respect to the leased lands and improvements thereon *whether or not owned by the United States.* \* \* \*

Also, the Antiquities Act of 1906, 34 Stat. 225, 16 U.S.C. § 430 (1970), offers no authority for such an intrusion. The Act is limited by its own terms to matters of historic or scientific interest that are situated upon "lands owned or controlled by the Government of the United States." It has long been the position of this Department that per-

mits under the Act may not be issued for excavations and investigations on patented lands. Solicitor's Opinion, *Archaeological Ruins*, 52 L.D. 269, 272 (1928).

Neither is there any warrant to authorize the entry of private lands for this purpose in the language of the National Environmental Policy Act of 1969, the Historic Sites Act of 1935, or the National Historic Preservation Act of 1966. In fact, a provision at 16 U.S.C. § 469a-1 (1970 Supp. V, 1975), indicates that Congress is fully aware of the limitations of federal authority where private property is concerned. The provision states:

(b) Whenever any Federal agency provides financial assistance by loan, grant, or otherwise to any private person, association, or public entity, the Secretary, if he determines that significant scientific, prehistorical, historical, or archaeological data might be irrevocably lost or destroyed, may with funds appropriated expressly for this purpose conduct, *with the consent of all persons, associations, or public entities having a legal interest in the property involved*, a survey of the affected site and undertake the recovery, protection, and preservation of such data (including analysis and publication). The Secretary shall, unless otherwise mutually agreed to in writing, compensate any person, association, or public entity damaged as a result of delays in construction or as a result of the temporary loss of the use of private or any nonfederally owned lands. [Italics added.]

It is clear that neither the Bureau of Land Management nor its oil and gas lessee can compel the landowner to allow archaeological survey or salvage work on his land. All that can be done is to seek his permission. But the lessee should

not be obliged to accept the loss of all significant value of his lease if the landowner refuses permission, nor should the people of the United States be denied the use of the mineral which has been reserved in their name in that event.

This Board has held that stipulations may be imposed on oil and gas leases for the protection of other land values, but the stipulations must be such that they do not unreasonably interfere with the lessee's right of enjoyment. *A. Helander*, 15 IBLA 107 (1974). I think that to condition the lessee's right of enjoyment of his lease on obtaining the acquiescence of a third party is to unreasonably place the right of enjoyment in jeopardy. We have also held that a lease stipulation "should be a reasonable means to the intended purpose." *Cecil A. Walker*, 26 IBLA 71, 74 (1976). I do not regard this as such.

Therefore, I would amend the stipulation to require only that the lessee show to the satisfaction of the BLM that a diligent and bona fide effort had been made to secure the landowner's written consent to the archaeological work. Upon a showing by the lessee that such an effort had been made without success, the entire requirement would be waived.

EDWARD W. STUEBING,  
*Administrative Judge.*

WE CONCUR:

DOUGLAS E. HENRIQUES,  
*Administrative Judge.*

FREDERICK FISHMAN,  
*Administrative Judge.*

**ISLAND PARK RESORTS, INC.****1 Teton 1**Decided *December 13, 1976*

Appeal by Island Park Resorts, Inc., Island Park, Idaho, from a decision of the Chief Authorized Officer, Bureau of Reclamation, denying its claim for loss of income resulting from the collapse of the Teton Dam.

Affirmed.

**1. Teton Dam Disaster Assistance Act:  
Loss of Property**

Congress, by including the word "directly" as the modifier of "resulting" in sec. 2 of the Teton Dam Disaster Assistance Act, Sept. 7, 1976, 90 Stat. 1211, so as to provide that all persons suffering loss of property "directly resulting" from the failure of that dam are entitled to receive full compensation from the United States, limited the scope of the Government's liability for claims under the Act.

**2. Teton Dam Disaster Assistance Act:  
Loss of Property**

The laws of the State of Idaho, utilized pursuant to sec. 3(a) of the Teton Dam Disaster Assistance Act, Sept. 7, 1976, 90 Stat. 1211, provide that remote damages are not compensable. Where alleged damages in lost tourist business are predicated on the washing out of a portion of a highway some 50 miles south of the appellant's resort, such damages are too remote to permit recovery.

**APPEARANCES:** Daniel D. Decker, President of Island Park Resorts, Inc., for appellant; William Burpee, Esq., Field Solicitor, for the Bureau of Reclamation.

**OPINION OF DIRECTOR  
RICHARDS**

**OFFICE OF HEARINGS AND  
APPEALS**

*Background*

On Aug. 20, 1976, Island Park Resorts, Inc., filed a claim for \$25,000 with the Bureau of Reclamation, alleging that it had suffered a loss of income in that amount as a result of the collapse of the Teton Dam which occurred on June 5, 1976. On Aug. 24, 1976, the Chief Authorized Officer of the Bureau of Reclamation rejected the claim *in toto*, citing the Annual Public Works Appropriation Act of 1976, Dec. 26, 1975, 89 Stat. 1035, and the Act of July 12, 1976, 90 Stat. 889. The general reason given for such rejection was that the loss claimed was not a direct result of the ensuing flood. Island Park Resorts, Inc., has filed this appeal pursuant to 43 CFR 419.5, 41 FR 29086 (1976).

*Contentions on Appeal*

Appellant operates Pond's Lodge, a year-round full-service resort in Island Park, Idaho. It estimated that business was going to be quite good in the summer of 1976, but alleges that as a result of the collapse of the Teton Dam on June 5, 1976, a portion of U.S. 190-20 to the south of Island Park was washed out, and the much expected tourist business did not materialize. Appellant contends that tour agencies routed the traveling public around Island Park, although a

dirt road detour around the damaged portion of the highway was established. Appellant submitted with its claim a detailed analysis of its gross income and net profits for the past several years and anticipated profits for 1976-77.

The Bureau of Reclamation does not contest the net profit figures, but contends that the loss of income was not a direct result of the dam failure, since appellant's lodge is some 50 miles north of the dam and above the path of the flood. The Bureau further contends that access to Island Park was available from the south by detours or from the north via Yellowstone National Park.

#### *Issue on Appeal*

Whether appellant suffered compensable damage as a direct result of the collapse of the Teton Dam.

#### *Decision*

Before deciding the issue at hand, a brief review of Congressional action and resulting Departmental regulations is in order. Soon after the collapse of the Teton Dam, Congress passed and the President signed an initial appropriation bill, "\* \* \* for the payments of claims for damages to or loss of property, personal injury or death proximately resulting from the failure on June 5, 1976, of the Teton River Dam \* \* \*." Act of July 12, 1976, 90 Stat. 889. The Department published regulations 43 CFR Part 419, 41 FR 29084, on July 13, 1976, pro-

viding in part, and pertinent to this appeal:

#### § 419.1-1 Eligibility.

(a) In order to qualify for payment under these regulations the claimant must certify at the time of submitting his claim that:

\* \* \* \* \*

(3) The damage, injury, or loss for which a claim is made occurred within the major disaster area as a *direct result* of the incident. [Italics supplied.]

41 FR 29085.

Then, Congress passed the Teton Dam Disaster Assistance Act of 1976, 90 Stat. 1211 (hereinafter called the Assistant Act), which became law on Sept. 7, 1976. This Act relieved a claimant from the burden of proving the cause of the failure of the dam. The enacting clause provided:

\* \* \* That the Congress finds that without regard to the proximate cause of the failure of the Teton Dam, it is the purpose of the United States to fully compensate any and all persons, for the losses sustained by reason of the failure of said dam. \* \* \*

The Act also gave a claimant the option to proceed under any other applicable provision of law in the courts. *Id.* § 9(a) at 1213. This rather unique procedure was patterned after similar relief fashioned by the Congress after an explosion in Texas City, Texas, in 1947. After the Supreme Court ruled that various claims arising from that disaster were barred by the "discretionary function" provision of the Federal Tort Claims Act, Congress passed relief legislation styled "as

gifts in the nature of disaster relief, based on humanitarian principles." S. Rep. No. 94-963, 94th Cong., 2d Sess. 5 (1976). The Congress used this disaster relief as precedent for the type of administrative relief here involved, without regard to who may have been at fault for the collapse of the dam.

The Assistance Act provides in pertinent part that:

\*\*\* All persons who suffered \*\*\* loss of property *directly resulting* from the failure on June 5, 1976, of the Teton Dam \*\*\* shall be entitled to receive from the United States full compensation for such \*\*\* loss of property. \*\*\* [Italics supplied.]

90 Stat. § 2 at 1211.

The Department implemented this more comprehensive legislation with additional regulations which became effective on Sept. 27, 1976. 43 CFR Part 419; 41 FR 42200. These regulations contain eligibility requirements identical to 43 CFR 419.1-1(a)(3) quoted above from the initial regulations.

[1] In applying these two Acts and implementing regulations to the compensability of the damage or loss claimed in this appeal, it must be determined at the outset if there is any difference between the phrases "directly resulting" and "proximately resulting." These two terms or phrases are often used interchangeably in negligence damage cases. *Federal Insurance Co. v. Bock*, 382 S.W. 2d 305, 307 (Tex. Civ. App. 1964); *Employers' Casualty Co. v. Underwood*, 142 Okla. 208, 286 P. 7, 10 (1930). As the Supreme Court of Missouri pointed

out in *Creech v. Blackwell*, 318 S.W. 2d 342, 351 (Mo. 1958): "There is no magic in the words 'proximately' or 'directly'. Their function is to exclude remote and non-causative negligence."

The legislative history of the Assistance Act reflects that S. 3542, as first passed by the Senate, did not include the word "directly" as a modifier of "resulting." Cong. Rec. S. 9705-710 (June 17, 1976). The Bill was amended in the House Committee, and Congressman Flowers, the manager of the Bill, stated in debate on the House floor:

At the hearings, the witness representing the Department of Interior expressed concern about the term "resulting" as referring to claims based upon damages, injuries, or deaths resulting from the collapse of the dam. To clarify the meaning of the term, the word "directly" was inserted so that the claims cognizable under the act will be those \*\*\* "directly resulting" from the collapse of the dam.

Cong. Rec. H. 8941 (Aug. 24, 1976).

Another supporter of the House version of the Bill, Congressman Kindness, then observed:

When our subcommittee began its hearings on this legislation, I was concerned about the scope of liability being assumed by the United States under this proposal. I am pleased that awards will be made under this authorization only where it can be demonstrated that the injury or loss "directly resulted" from the collapse of the dam.\*\*\*

Cong. Rec. H. 8941 (Aug. 24, 1976).

The House version as to this particular phrase eventually became law. Thus, it appears that it was

Congress' intent to limit the scope of liability for claims when it inserted the word "directly" before "resulting." *Cf.* H.R. No. 94-1423, 94th Cong., 2d Sess. 1 (1976).

[2] The Assistance Act, 90 Stat. § 3(a) at 1211 provides that, "[e]xcept as otherwise provided herein, the laws of the State of Idaho shall apply \* \* \*."

Idaho law seems to be settled that damages, to be compensable, must be those " \* \* \* damages [that] were the natural and direct or proximate consequences of the wrongful act complained of." *Jensen v. Wooters*, 56 Idaho 595, 57 P. 2d 340, 342 (1936). Stated conversely, remote damages are not compensable. "Remote damages are such as are the result of accident or an unusual combination of circumstances which could not reasonably be anticipated, and over which the party sought to be charged had no control." *Olson v. Quality-Pak Co.*, 93 Idaho 607, 469 P. 2d 45, 48 (1970).

We turn now to the facts involved in this appeal. Viewed in a light most favorable to the appellant these facts are:

1. That appellant operates a year-around resort in Island Park, Idaho, and is dependent on the flow of tourist traffic traveling north from Idaho Falls and south from Yellowstone on U.S. 190-20;

2. That before the collapse of the Teton Dam on June 5, 1976, the full normal tourist traffic was present on the highway from both directions in the vicinity of Pond's Lodge. (We do note that Island Creek, Idaho,

where the business is located, is not directly on U.S. 190-20, but appears to be located several miles east of that highway. We have taken judicial notice of Rand McNally Road Atlas, 1976, p. 29, in order to properly locate appellant's business in relation to the Teton Dam.);

3. That a dirt road detour of U.S. 190-20 around the segment washed away some 50 miles south of Island Park was available, but that tour agencies such as A.A.A. were advising people to use other routes that would bypass Island Park for those who were traveling north on that highway.

Based on these facts, appellant contends that but for the collapse of the dam and the washing out of the highway as above mentioned, more travelers would have come north past Island Park, and, by implication, more of them would have stopped and availed themselves of appellant's Lodge and related facilities. (Although appellant went into some detail in estimating anticipated profits based on prior years, there was no reference to the cancellation of confirmed reservations at the lodge after the flood.)

Had appellant contended that its own access to Pond's Lodge was denied or made more difficult, then there are Idaho cases on the subject of condemnation and inverse condemnation which would seem to apply. In the case of *Weaver v. Village of Bancroft*, 92 Idaho 189, 439 P. 2d 697 (1968), where a flood destroyed a culvert and blocked a

landowner's *sole* means of access, the Supreme Court of Idaho held:

It is undisputed in the instant case that appellant was cut off from all vehicular access both to and from his property and that this property is, in effect, isolated from the public right of way. As such, appellant is entitled to any just compensation which he can prove by way of damages to his right of vehicular access. (Compare *Snyder v. State of Idaho and City of Boise*, 92 Idaho 175, 438 P. 2d 920, March 25, 1968.)

439 P. 2d at 701.

The Court pointed out that the measure of damages in such a case is the difference between the market value of the property immediately before the taking and its market value after the taking.<sup>1</sup>

However, when a landowner still has access to the general highway system, though more difficult or circuitous, it has generally been held that he has not suffered compensable damages. The Court in *James v. State*, 88 Idaho 172, 397 P. 2d 766 (1964), was faced with an allegation by a tourist facility that it suffered compensable damages due to the relocation of a highway. There, the Court held:

\* \* \* East bound traffic, to reach appellants' property from the Interstate and again continue easterly, must retrace its path. This alone, does not constitute a taking of property. *At most it can only be considered as constituting a more inconvenient, or circuitous route.* Appellants' complaint and affidavit, as a practical matter, is directed to the asserted lack of access to and from the main

stream of traffic which no longer flows directly in front of their place of business, and not to mere lack of access to the state highway system. Diversion of traffic occasioned by the relocation of the highway does not cause a compensable injury, for *appellants have no property right in any flow of traffic over a particular highway.* [Citations omitted.] (Italics supplied.)

397 P. 2d at 769-70.

Courts in other States are in accord with the above-stated holding. *Uvodich v. Arizona Board of Regents*, 9 Ariz. App. 400, 453 P. 2d 229 (1969); *Valenta v. County of Los Angeles*, 39 Cal. Rptr. 909, 394 P. 2d 725 (1964); *State v. Silva*, 71 N.M. 350, 378 P. 2d 595 (1962). As the Colorado Supreme Court observed in *Radinsky v. City and County of Denver*, 410 P. 2d 644, 647 (1966):

\* \* \* As to the Radinskys, they suffered no greater loss *in kind* than the general public, although they may have possibly suffered a greater degree of injury due to the particular type of business they are engaged in. \* \* \* [Italics in original.]

Under these precedents, appellant fares no better by contending that the access of its potential customers has been made more circuitous or that they are diverted at a point some 50 miles away from Pond's Lodge.

Appellant argues that you do not have to get wet to be damaged by a flood. But even under ordinary negligence damage concepts, the injury complained of must be the proximate and direct result of the wrong claimed—here, the collapse of the Teton Dam. *Jensen v. Wooters, supra*. For example, in *Petitions of Kinsman Transit Co. v.*

<sup>1</sup> The loss of business profits in such cases is not compensable. Evidence of such loss is admissible if it bears on the market value of the property. *State ex rel. Moore v. Bastian*, 97 Idaho 444, 546 P. 2d 399, 403 (1976).

*City of Buffalo*, 388 F. 2d 821 (2d Cir. 1968), where a ship was negligently allowed to break loose from its moorings, struck a second ship which also broke loose and both ships drifted down the river destroying a bridge and creating a dam which caused flooding and an ice jam, damages were sustained by the owner of cargo downstream, as a result of being unable to unload its cargo at a point upstream from the dam. Damages were also incurred by a company unloading cargo upstream from the dam in having to rent special equipment to unload such cargo. The Court, in applying New York law, held that:

\* \* \* The instant claims occurred only because the downed bridge made it impossible to move traffic along the river. Under all the circumstances of this case, we hold that the connection between the defendants' negligence and the claimants' damages is too tenuous and remote to permit recovery. \* \* \* [Footnote omitted.]

*Id.* at 825.

In any event, the limiting of liability for damages is more a question of policy than a certain and precise definition fitting each set of facts. W. L. PROSSER, *LAW OF TORTS* 264-65 (4th ed. 1971). Congress by enacting the Assistance Act relieved victims of the flood of the burden of proving the cause of the collapse of the dam for purposes of these administrative claims. However, the Congress and the Department, through regulations, were careful to limit compensability of these claims to those who suffered

damages or injury as a direct result of the collapse of the dam.

We find appellant's asserted damages, under any legally recognized concept, too remote to permit recovery. *Olson v. Quality-Pak Co.*, *supra*. Therefore, the decision of the Chief Authorized Officer, rejecting appellant's claim, is affirmed.

Pursuant to 43 CFR 419.5(c), 41 FR 42204 (1976), this constitutes the final decision of the Secretary.

JAMES R. RICHARDS,  
*Director.*

## APPEAL OF THE STATE OF ALASKA

### 1 ANCAB 281

Decided *December 20, 1976*

Appeal from the Decision of the Alaska State Director, Bureau of Land Management, #A-057388, vacating tentative approval and rejecting land selection application of the State of Alaska under sec. 6 of the Alaska Statehood Act, 72 Stat. 339, as amended, 48 U.S.C. Ch. 2 (1970).

Decision of the Bureau of Land Management, #A-057388, dated Oct. 3, 1974, vacated and remanded, on Dec. 20, 1976.

1. Alaska Native Claims Settlement Act: Land Selections: Generally—Alaska Native Claims Settlement Act: Land Selections: State Interests: Statehood Act Selections: Generally—Alaska Native Claims Settlement Act:

## **Alaska Native Claims Appeal Board: Appeals: Jurisdiction**

Under 43 CFR, Part 4, 4.1(5) and Subpart J, the Alaska Native Claims Appeal Board has jurisdiction over an appeal by the State of Alaska from an adverse decision of the Bureau of Land Management on a land selection application pursuant to the Alaska Statehood Act when the BLM's adverse decision is based upon a construction of the provisions of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1624 (Supp. IV, 1974), *as amended*, 89 Stat. 1145 (1976).

## **2. Alaska Native Claims Settlement Act: Land Selections: Generally—Alaska Native Claims Settlement Act: Land Selections: State Interests: Statehood Act Selections: Generally—Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing—Alaska Native Claims Settlement Act: Administrative Procedure: Standing**

The State of Alaska has standing to appeal a Decision of the Bureau of Land Management to the Alaska Native Claims Appeal Board as a party "who claims a property interest in land affected" by a Decision of the Bureau of Land Management, within the meaning of 43 CFR 4.902, when the BLM Decision vacates the tentative approval previously given to the State's selection and rejects the State's land selection application filed under the Alaska Statehood Act because of a conflict with the provisions of the Alaska Native Claims Settlement Act.

## **3. Alaska Native Claims Settlement Act: Land Selections: Generally—Alaska Native Claims Settlement Act: Administrative Procedure: Decisions**

The Decision of the Bureau of Land Management vacating the previously granted tentative approval and rejecting

the land selection application of the State of Alaska must be vacated and remanded for further proceedings when it does not appear that the land selection application by the Native Corporation has been adjudicated.

**APPEARANCES:** James N. Reeves, Esq., Assistant Attorney General, for the State of Alaska; Robert E. Price, Esq., Regional Solicitor, and John W. Burke, Esq., Attorney, Office of the Solicitor, U.S. Department of the Interior, for Bureau of Land Management; A. Robert Hahn, Esq., Hahn, Jewell & Stanfill, for Seldovia Native Association, Inc.; James Vollintine, Esq., and John R. Snodgrass, Esq., Graham & James, and James D. Linxwiler, Esq., for Cook Inlet Region, Inc.; Ben T. Delahay, Esq., and Theo L. Carson, Jr., Esq., for Kenai Peninsula Borough.

## *OPINION BY CHAIRMAN BRADY*

## *ALASKA NATIVE CLAIMS APPEAL BOARD*

## **DECISION VACATING AND REMANDING BUREAU OF LAND MANAGEMENT DE- CISION #A-057388**

The Alaska Native Claims Appeal Board, pursuant to delegation of authority in the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1624 (Supp. IV, 1974), *as amended*, 89 Stat. 1145 (1976), and the implementing regulations in 43 CFR Part 2650 and Part 4, Subpart J (1975), hereby makes the following findings, conclusions, and decision vacating and remanding

the Decision of the State Director, Bureau of Land Management, #A-057388, dated Oct. 3, 1974, for further proceedings consistent with this opinion.

Pursuant to regulations in 43 CFR Part 2650, the State Director, Bureau of Land Management, is the officer of the United States Department of the Interior who is authorized to make final decisions on behalf of the Secretary on land selections under the Alaska Statehood Act, 72 Stat. 339, *as amended*, 48 U.S.C. Ch. 2 (1970), and the Alaska Native Claims Settlement Act, subject to administrative appeal.

On Oct. 3, 1974, the State Director, Bureau of Land Management (hereinafter BLM) issued a Decision on State Selection Application #A-057388. The Decision was entitled "*Decision of Jan. 3, 1964 Vacated Application Rejected.*" The pertinent portions of the Decision read:

On June 13, 1962, the State of Alaska filed selection application A-057388 for all of T. 8 S., R. 14 W., Seward Meridian, excluding prior valid rights, claims or patented lands. \* \* \*

On Jan. 3, 1964, the State received tentative approval for approximately 6,917 acres of unsurveyed land in this township.

On Feb. 11, 1974, Seldovia Native Association, Inc. filed selection application AA-6701-A in accordance with sec. 12(a) of the Alaska Native Claims Settlement Act. This section requires villages to select all of the available lands within their core townships.

Sec. 11(a)(2) of the Alaska Native Claims Settlement Act withdrew for selection, by villages, the lands that have

been tentatively approved to or selected by the State of Alaska.

As the lands in T. 8 S., R. 14 W., Seward Meridian have been selected by the village of Seldovia, the decision of Jan. 3, 1964, is vacated and selection application A-057388 is rejected. The case will be closed when this decision becomes final.

In accordance with the regulations in 43 CFR 4.400, the applicant has the right of appeal to the Board of Land Appeals, Office of Hearings and Appeals. \* \* \*

If an appeal is taken the adverse party to be served is:

Seldovia Native Association, Inc.  
P.O. Box 185  
Seldovia, Alaska 99663

On Nov. 1, 1974, the State of Alaska filed a Notice of Appeal with the BLM and the Interior Board of Land Appeals. Subsequently, initial pleadings were filed with the Interior Board of Land Appeals.

On May 16, 1975, jurisdiction over this appeal was transferred from the Interior Board of Land Appeals to the Alaska Native Claims Appeal Board (hereinafter the Board).

By Order dated July 31, 1975, and Order dated Sept. 24, 1975, the Board designated the following parties to this appeal: the State of Alaska; the Bureau of Land Management; the Seldovia Native Association, Inc.; the Cook Inlet Region, Inc.; and the Kenai Peninsula Borough. Briefs have been filed with the Board by all of the designated parties, and BLM has filed a Petition requesting the Board to remand this case to the BLM for further consideration.

The record on this appeal was closed by Order of the Board, effective Feb. 27, 1976.

## JURISDICTION

[1] This is an appeal by the State of Alaska from a BLM Decision, vacating its tentative approval previously granted in 1964 and rejecting its land selection application to 6,917 acres of unsurveyed land in T. 8 S., R. 14 W., Seward Meridian. The BLM Decision was based upon a construction of secs. 11(a)(2) and 12(a) of the Alaska Native Claims Settlement Act. Therefore, this appeal falls within the jurisdiction of the board under 43 CFR Part 4, 4.1(5) and Subpart J, and as outlined in the preface to the final publication of Subpart J in 40 FR 33172 (Aug. 6, 1975).

Pursuant to this Departmental policy, the BLM Decision should have directed that an appeal, if any, be filed with the Board, rather than the Interior Board of Land Appeals. However, no prejudice accrues to the State of Alaska from this error, since the appeal appears to have been properly filed in accordance with the law and regulations applicable to appeals to the Interior Board of Land Appeals, and therefore is deemed properly filed with this Board pursuant to 43 CFR 4.901(c) and the transfer of jurisdiction over this appeal from the Interior Board of Land Appeals to this Board by the Director, Office of Hearings and Appeals, on May 16, 1975.

## STANDING

[2] The Standing of the State of Alaska to appeal to the Board is determined according to 43 CFR which provides:

### § 4.902 Who May Appeal

Any party who claims a property interest in land affected by a determination from which an appeal to the Alaska Native Claims Appeal Board is allowed, or an agency of the Federal Government, may appeal as provided in this subpart. \* \* \*

No Statement of Standing to appeal was filed by the State of Alaska in this case. Since the State, however, is appealing a Decision which vacated tentative approval and rejected the land selection application of the State, the State must necessarily be considered to have standing to appeal such a Decision.

## ADMINISTRATIVE PROCEDURE

[3] On Jan. 7, 1976, the BLM filed a Petition requesting the Board to remand this case to the BLM for further consideration, and subsequently briefs were filed by the Cook Inlet Region, Inc., and the Seldovia Native Association, Inc., in opposition to the Petition for remand. The Petition for remand requests that the BLM be allowed to reconsider its decision in the light of subsequent developments, and contains the following statement:

A decision to remand the case to BLM will also permit the BLM to decide the companion case to this appeal. The BLM has not yet acted on the land selection

December 20, 1976

by Seldovia and has indicated that it has no intention of making a decision therein until the disposition of this appeal.

Although, it was inferable from the BLM Decision of Oct. 3, 1974, that the land selection by Seldovia, which was the basis for rejecting the land selection and vacating the tentative approval of the State of Alaska, had been adjudicated by BLM and had been found to be entitled to priority over the State land selection, the BLM's Petition for remand clearly negates that inference. Since it thus appears that the mere filing of a selection application by the Seldovia Native Association, Inc., was the basis for the BLM Decision it is clear that the BLM Decision was issued prematurely, and must be vacated and remanded for further proceedings.

Secs. 11(a) and 12 of the Alaska Native Claims Settlement Act, withdraw and make available for Native selection certain lands previously selected by and tentatively approved to the State of Alaska. However, the Act is not completely self-executing. The regulations in 43 CFR Part 2650 require the filing of a selection application by Native Corporations, impose various limitations upon Native selections pursuant to the Secretary's authority to administer the Settlement Act, and invoke the normal procedures of the BLM for the identification, determination and adjudication of conflicting interests in the land.—*cf.*, 43 CFR Part 2650, and Subpart

1821. Since it appears that no determination has been made that the Native selection was properly filed, meeting the requirements of the Act and the Regulations, and is thus entitled to priority over the previously filed State land selection, the BLM Decision of Oct. 3, 1974, erroneously vacated the tentative approval and rejected the land selection application of the State of Alaska, and must therefore be vacated and remanded for further proceedings.

This Board cannot rule on the State of Alaska's tentatively approved land selection as it relates to secs. 11(a) and 12 of the Alaska Native Claims Settlement Act when the Seldovia Native Association's selection application involving the same lands has not been adjudicated.

The Board, therefore, vacates the BLM Decision of Oct. 3, 1974, which rejected the State of Alaska's Selection Application #A-057388 and remands this case for further proceedings consistent with this Decision.

This represents a unanimous decision of the Board.

JUDITH M. BRADY,  
*Chairman.*

WE CONCUR:

ABIGAIL F. DUNNING,  
*Member of the Board.*

LAWRENCE MATSON,  
*Member of the Board.*

**POCAHONTAS FUEL COMPANY****7 IBMA 121**Decided *December 20, 1976***OPINION BY ADMINISTRATIVE JUDGE STRIEGEL****INTERIOR BOARD OF MINE OPERATIONS APPEALS**

Appeals by the Mining Enforcement and Safety Administration and the United Mine Workers of America from a decision by Administrative Law Judge Charles C. Moore, Jr. (Docket No. HOPE 75-680), dated Mar. 3, 1975, vacating a notice of violation issued pursuant to sec. 104(b) of the Federal Coal Mine Health and Safety Act of 1969.

**Affirmed.**

**1. Federal Coal Mine Health and Safety Act of 1969: Entitlement of Miners: Generally**

Responsibility for the enforcement of sec. 203(b)(3) is vested in the Secretary of the Interior. 30 U.S.C. § 843(b)(3) (1970).

**2. Federal Coal Mine Health and Safety Act of 1969: Entitlement of Miners: Compensation: Generally**

The phrase "regular rate of pay," as used in sec. 203(b)(3), means the rate of compensation due a miner under his job classification under the current wage agreement.

**APPEARANCES:** Richard V. Backley, Esq., Assistance Solicitor, and Frederick W. Moncrief, Esq., Trial Attorney, for appellant Mining Enforcement and Safety Administration; Steven B. Jacobson, Esq., for the United Mine Workers of America; Timothy M. Biddle, Esq., for appellee, Pocahontas Fuel Company.

*Background*

On Dec. 31, 1974, an alleged violation of an interim mandatory health and safety standard, namely, sec. 203(b)(3) of the Federal Coal Mine Health and Safety Act of 1969 was called to the attention of a Mining Enforcement and Safety Administration (MESA) inspector by the United Mine Workers of America (UMWA). 30 U.S.C. § 843(b)(3) (1970) 30 CFR 90.34. After an investigation of the issues involved and discussions with all interested parties the inspector determined that there was in fact a violation and, therefore, issued a 104(b) notice of violation to Pocahontas Fuel Company (Pocahontas). 30 U.S.C. § 814(b) (1970). The specific condition or practice set out on the sec. 104(b) notice provided, to wit:

Howard Mullins, SSN 236-74-8043 (official 203(b) transferred employee) was not receiving compensation for his work at the same rate as immediately prior to his transfer. The company's records and management's and employee's statements indicate that Mr. Mullins was employed and paid as a roofbolter operator regularly for several weeks immediately prior to his transfer. Since the official transfer Mr. Mullins has been paid as a general inside laborer at a lesser rate of pay.

Both the statute and the regulation cited as having been violated by the operator in this notice prescribe the

same rate of pay to be received by a miner who elects under sec. 203 of the Act to transfer to an area of the mine less injurious to his developing pneumoconiosis, to wit:

\*\*\* compensation \*\*\* at not less than the regular rate of pay received by him immediately prior to his transfer.

On Jan. 3, 1975, Pocahontas filed an application for review under sec. 105(a)(1) of the Act, 30 U.S.C. § 815(a)(1) (1970), and a motion for expedited hearing pursuant to 43 CFR 4.514. The motion for expedited hearing was granted on Jan. 7, 1975, and a hearing was scheduled for Jan. 16, 1975. On Jan. 16, the Administrative Law Judge issued an order extending the original abatement time from 8 a.m., Jan. 6, 1974 [should have said 1975] until "the decision in this matter has become a final decision of the Department of the Interior through operation of law." Prior to the hearing, the parties filed a written stipulation of fact.

On Mar. 3, 1975, the Administrative Law Judge issued his decision finding that MESA did have the authority to enforce sec. 203(b)(3) as a mandatory health standard by issuing a notice of violation under the provisions of sec. 104(b) of the Act. The Judge further held that the notice of violation should be vacated due to the fact that the operator had complied with sec. 203(b)(3). A notice of appeal was filed with the Board by the UNWA and MESA, and subsequently, timely briefs were submitted for the Board's consideration by all parties involved.

At the hearing, Pocahontas contended that there was no authority for MESA to assume jurisdiction over sec. 203(b)(3) and relief should have been sought from the Secretary of Labor under sec. 428 of the Act through procedures prescribed by him. Pocahontas has not pressed its jurisdictional argument on appeal, but it did suggest by footnote in its brief that "\*\*\* the preliminary question of jurisdiction is \*\*\* properly before the Board if the Board wishes to deal with it *sua sponte* \*\*\*."

Both of the appellants, MESA and the UMWA, contend that the term "regular rate of pay," as used in sec. 203(b)(3) of the Act, should be defined as that rate of pay being received by a miner immediately preceding his transfer irrespective of the job classification and that therefore the Administrative Law Judge is incorrect in holding otherwise.

Pocahontas, on the other hand, contends that the Administrative Law Judge correctly held in the instant case that regular rate of pay means the rate of pay to which a miner is entitled under his particular job classification under the current wage agreement and not the pay being received as a result of the temporary detail.

### *Issues*

The issues to be disposed of in this decision are:

A. Whether the Administrative Law Judge correctly held that the Secretary has jurisdiction to en-

force sec. 203(b)(3) of the Act by issuing a notice of violation under sec. 104(b).

B. Whether the Administrative Law Judge correctly construed and applied the term "regular rate of pay" as used in sec. 203(b)(3) of the Act in the circumstances of this case.

### *Discussion*

For the reasons stated hereafter, the Board affirms the Administrative Law Judge's decision, holding that the Secretary, and by delegation MESA, have jurisdiction to enforce sec. 203(b)(3) of the Act and that the term "regular rate of pay" is properly defined in the circumstances of this case by reference to the particular miner's job classification under the applicable collective bargaining agreement between the UMWA and the operator.<sup>1</sup>

### A.

[1] Sec. 203(b)(3) falls within Title II of the Act which comprises secs. 201 through 206. 30 U.S.C. §§ 841-846 (1970). Sec. 201(a) prescribes that "\* \* \* provisions of sections 202 through 206 of this title \* \* \* shall be enforced in the same manner and to the same extent as any mandatory health standard promulgated under the provisions of sec. 101 of this Act." The "manner" of enforcement is set forth in

sec. 104 which places exclusive enforcement in the "Secretary," a term defined by sec. 3(a) as "\* \* \* the Secretary of the Interior or his delegate." 30 U.S.C. §§ 802(a), 814 (1970). Based on the foregoing, there can be no question that the Congress originally conferred the jurisdiction on the Secretary to enforce the subject statutory provision.

It is true, however, that the Act was amended in May 1972 by adding (among other secs.) sec. 428 which provides procedures by which a miner may obtain relief from the Secretary of Labor if he is able to demonstrate that he has been discriminated against by an operator, "\* \* \* by reason of the fact that such miner is suffering from pneumoconiosis \* \* \*." There was no repeal of sec. 203(b)(3). 30 U.S.C. § 938 (1970). It cannot, however, be inferred from the language or passage of the amendment that the Secretary's power or responsibility to enforce the interim mandatory health standards was abrogated in any way.

In any event, Pocahontas' argument that the Secretary is without jurisdiction cannot prevail before this Board, because the Secretary asserted jurisdiction over sec. 203 of the Act in Dec. 1972 when he promulgated regulations implementing this sec. of the Act. 30 CFR 90.30-90.40. The assertion that the Secretary is without jurisdiction is then an attack on the validity of these regulations and the Board has often stated it has no authority to review

<sup>1</sup> The Board takes cognizance of the fact that not all operators are constrained by a collective bargaining agreement and as to those instances the Board reserves judgment as to the appropriate construction of the term "regular rate of pay."

the validity of regulations promulgated by the Secretary. *See, e.g., UMW v. Inland Steel Company*, 6 IBMA 71, 83 I.D. 87, 1975-1976 OSHD par. 20,529 (1976) and 43 CFR 4.1.

Referring to sec. 203(b)(3), Pocahontas contended before the Administrative Law Judge that the Board had previously held that the "Secretary of Interior was without jurisdiction over this matter, \* \* \*." In support of that contention, Pocahontas cited *Jesse Higgins v. Old Ben Coal Corporation*, 3 IBMA 237, 81 I.D. 423, 1973-1974 OSHD par. 18, 228 (1974). *Higgins, supra*, is not in point because that case stands merely for two propositions, *i.e.*, (1) that allegations by a miner of discrimination based on pneumoconiosis constitute a legally sufficient claim for relief from the Secretary of Labor under sec. 428 and not from the Secretary under sec. 110, 30 U.S.C. §§ 820(b), 938 (1970); and (2) that a miner cannot proceed *directly* to file for relief under sec. 203 for an alleged violation thereof. The decision in the instant case is not intended to disturb either of those propositions.

Even though both this case and the *Higgins* case involve the rate of compensation to be received by a miner who exercises his option to transfer under sec. 203(b)(2) of the Act, the instant case has arisen from a different set of procedural circumstances. The *Higgins* case was brought by individual miners as contrasted to the instant case which is being prosecuted by MESA.

In sum, we conclude that the Administrative Law Judge correctly rejected Pocahontas' attack on the Secretary's jurisdiction to enforce sec. 203.

## B.

[2] As has been previously pointed out, the facts in this case are undisputed and were stipulated prior to hearing.

The facts which led to the inspector's conclusion that the operator had not complied with sec. 203(b)(3) were: (1) immediately prior to transfer, Mullins had been working the majority of the time on a temporary detail as a "roof bolter"; (2) under the collective bargaining agreement, Mullins' job classification was "general inside laborer"; (3) upon transferring Mullins to a non-face occupation in the mine, the operator compensated him at a rate of pay supported by his job classification rather than the compensation he had been receiving as a temporary "roof bolter." Under the collective bargaining agreement "general inside laborers" are paid \$42.75 per day and "roof bolters" are paid \$47.25 per day.

The record discloses that Mullins, prior to his employment at the Maitland Mine, had held a position as a permanent roof bolter.<sup>2</sup> From

<sup>2</sup> Mullins was previously employed at the company's Kepler Mine. That mine was closed in Dec. 1973. The company offered Mullins employment at the Maitland Mine; however, since there were no permanent roof bolter jobs open at that time he was offered and accepted employment as a general inside laborer. Mullins began work in the Maitland Mine on Jan. 9, 1974.

Jan. 9, 1974, until May 10, 1974, the date the operator was notified by MESA that Mullins had elected to transfer to a non-face occupation in the mine under sec. 203(b)(2), Mullins worked the majority of his time in the Maitland Mine on a temporary detail as a roof bolter.<sup>3</sup> During the approximate 5-month period of Mullins' employment in the Maitland Mine, there were five permanent roof bolter positions advertised, one of which (Apr. 2, 1974) went unfilled because there were no applicants.

On May 28, 1974 (more than 2 weeks after the operator had been advised by MESA of Mullins' election to transfer to a non-face occupation), three additional permanent roof bolter positions were advertised. Mullins bid on one of these but was unsuccessful because another applicant had seniority rights over him.

It is obvious from the facts outlined above that had Mullins been desirous of gaining a position in the

Maitland Mine as a permanent roof bolter there were ample opportunities for him to make his intentions known. The facts further demonstrate that had Mullins been desirous of a permanent roof bolter position and had he bid on the Apr. 2, 1974 position, he would have been successful. It appears that only after he had elected to transfer to a non-face occupation in the mine did he make his desire for a permanent roof bolter position known.

The Board is of the opinion that this miner, having rejected the opportunity to obtain a permanent position of roof bolter commanding a higher rate of pay than his job classification as an inside laborer would support, should not now be entitled to the rights of a permanent roof bolter to be transferred with him to a non-face occupation in the mine.<sup>4</sup>

We hold, therefore, that the Administrative Law Judge properly concluded that Pocahontas did not violate sec. 203(b)(3) of the Act, and we must affirm his order vacating the subject notice of violation.

### ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Judge's deci-

<sup>3</sup> Sec. 203(b)(2) reads as follows: "Effective 3 years after the date of enactment of this Act, any miner who in the judgment of the Secretary of Health, Education, and Welfare based upon such reading or other medical examinations, shows evidence of the development of pneumoconiosis shall be afforded the option of transferring from his position to another position in any area of the mine, for such period or periods as may be necessary to prevent further development of such disease, where the concentration of respirable dust in the mine atmosphere is not more than 1.0 milligrams of dust per cubic meter of air, or if such level is not attainable in such mine, to a position in such mine where the concentration of respirable dust is the lowest attainable below 2.0 milligrams per cubic meter of air."

<sup>4</sup> The Board reserves judgment for the future should the facts in a given case clearly indicate that an operator, in bad faith, abuses the job classification system by excessive use of temporary job detailing.

sion in the above-captioned case IS  
AFFIRMED.

LOUIS E. STRIEGEL,  
*Administrative Judge.*

WE CONCUR:

DAVID DOANE,  
*Chief Administrative Judge.*

HOWARD J. SCHELLENBERG, JR.,  
*Administrative Judge.*

### EASTERN ASSOCIATED COAL CORPORATION

On Reconsideration *En Banc*

7 IBMA 133

Decided December 20, 1976

Petition for Additional Reconsideration by the Mining Enforcement and Safety Administration of the Board's decision of Sept. 30, 1976, reversing its prior judgment and affirming a decision by Administrative Law Judge Moore vacating 22 notices of violation under sec. 109 of the Federal Coal Mine Health and Safety Act of 1969 in Docket Nos. MORG 73-131-P, 73-145-P, HOPE 73-305-P, 73-382-P, and 73-465-P.

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Respiratory Dust Program: Generally

Coal dust particulates in excess of 5 microns in size are not "respirable dust" as a matter of law under 30 U.S.C. § 878(k) (1970) and 30 CFR 70.2(i).

APPEARANCES: Thomas A. Mascolino, Esq., Acting Associate Solicitor, Robert J. Phares, Esq., Acting Assistant Solicitor, and Robert A. Cohen, Esq., Trial Attorney, for petitioner, Mining Enforcement and Safety Administration; Thomas E. Boettger, Esq., and James R. Kyper, Esq., for respondent, Eastern Associated Coal Corp., Guy Farmer, Esq., and William A. Gershuny, Esq., for amicus curiae, Bituminous Coal Operators' Assn., Inc.; Howard Walderman, Esq., for amicus curiae, National Institute of Occupational Health and Safety.

OPINION BY CHIEF ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF MINE  
OPERATIONS APPEALS

On Sept. 30, 1976, a majority of a three member panel of the Board set aside its prior decision in Appeal No. IBMA 75-25, 5 IBMA 185, 82 I.D. 506, 1975-1976 OSHD par. 20,041 (1975), and concluded that Administrative Law Judge Charles C. Moore had correctly vacated 22 notices of violation issued by various federal coal mine inspectors to Eastern Associated Coal Corporation (Eastern) under sec. 104(i) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 814(i) (1970). 7 IBMA 14, 83 I.D. 425, 1976-1977 OSHD par. 21,195 (1976). Judge Moore had acted on a petition by the Mining Enforcement and Safety Administration (MESA) for assessments of civil penalty under sec. 109 of the

Act, alleging that on the 22 separate occasions represented by such notices Eastern had exceeded the applicable limit on the average concentration of respirable dust in the mine atmosphere. 30 U.S.C. § 819 (1970).<sup>1</sup>

Simply stated, the majority's conclusion was that Eastern had overcome MESA's prima facie case by showing by a preponderance of the evidence that MESA's sample data, purporting to represent concentrations of "respirable dust," prejudicially included indeterminate fractions of oversize dust particulates which are not respirable as a matter of law under sec. 318(k) of the Act, 30 U.S.C. § 878(k) (1970), and its regulatory counterpart, 30 CFR 70.2(i).

On Oct. 8, 1976, MESA moved for a stay of the final effect of the majority's Sept. 30 decision pending additional reconsideration. MESA also moved for consolidation of the instant case with Appeal No. IBMA 76-54 which also involves Eastern and presents a similar question regarding oversize particulates.

A special *en banc* panel of all eligible members of the Board was assembled on Oct. 13, 1976, for the purpose of dealing with MESA's motion and any further ensuing proceedings.<sup>2</sup> In an order released

on that same date, the Board granted MESA's motion. An additional 15-day period for submission of supplemental briefs was allowed and oral argument on the record was set for Nov. 5, 1976. Timely supplemental briefs were filed by the parties, and the Board has also had the benefit of the views of the Bituminous Coal Operators' Assn., Inc. (BCOA), and the National Institute of Occupational Health and Safety, Department of Health, Education, and Welfare, both of which participated as amici curiae. Oral argument before the undersigned panel took place as scheduled.

It should be recalled that the majority held that the applicable limit on the average concentration of respirable dust in the mine atmosphere allegedly violated by Eastern was 3.0 milligrams of respirable dust per cubic meter of air, respirable dust being defined as "\* \* \* only dust particulates 5 microns or less in size." The majority arrived at that interpretation by reading sec. 202(b)(1), 30 U.S.C. § 842(b)(1) (1970), and its regulatory alter ego, 30 CFR 70.100(a), in conjunction with sec. 318(k) and its regulatory counterpart, 30 CFR 70.2(i).

While MESA's specific arguments have varied from time to time, its basic position has been that

<sup>1</sup> The detailed background of this appeal is set forth in the Board's previous opinions and need not be repeated here.

<sup>2</sup> Although the Board is authorized to have three regular members, for a long time and until recently, it has labored with the services of only two. When necessary, the ex-officio member of the Board, the Director of the Office of Hearings and Appeals, or the alternate member of the Board, David Torbett, was

designated to sit with the regular members.

The *en banc* panel assembled here, consisting of the three regular Board members as well as the ex-officio and alternate members, was assigned because this case has become a test vehicle of overwhelming and extraordinary importance. A similar case has not arisen in the past, and it is unlikely that any *en banc* panels will be assembled in the future.

sec. 202 of the Act and 30 CFR 70.100 were not meant to be read in light of the definition of the term "respirable dust" in sec. 318(k) and 30 CFR 70.2(i), respectively. In the midnight hour of this proceeding, MESA has reasserted that position and has sought to shore it up with new arguments. Although counsel for MESA equivocated at oral argument, contending euphemistically that MESA was merely asking that the Board hold sec. 318(k) and 30 CFR 70.2(i) "*inapplicable*" to sec. 202 and 30 CFR 70.100, MESA's brief makes clear in no uncertain terms that MESA is demanding that we "*ignore*" the former in construing the latter.

In arguing for its position in this latest round of briefing, MESA neither quotes nor relies on the literal language of the Act or the regulations. Implicit in this omission is a recognition that the preambles to sec. 318 of the Act and 30 CFR 70.2 leave no room for a serious assertion that subsec. (k) of sec. 318 and subsec. (i) of 30 CFR 70.2 are "*inapplicable*" or can be "*ignored*" when reading subsecs. (b) and (e) of sec. 202 of the Act and 30 CFR 70.100, respectively.<sup>3</sup>

MESA rests its position on a series of related arguments for a practical construction designed to

rationalize past practices, the literal language of the Act and regulations to the contrary notwithstanding.

Before addressing ourselves specifically to MESA's latest arguments, we state at the outset that all of the undersigned agree that the majority correctly decided this case on reconsideration. We see no need to repeat what was said before, and we find it necessary to deal in detail only with the specific assertions advanced by MESA in the latest round of arguments.

Treating MESA's arguments in the order in which they were briefed, we begin with MESA's renewed effort to persuade the Board that the Congress intended sec. 202 (b) to be read in conjunction with sec. 202(e) without regard for sec. 318(k) in order to determine the applicable standard of care. We are asked to draw that conclusion on the basis of two premises. The major premise is that the Congress *required* rather than merely authorized sampling by the MRE instrument or other equivalent device in sec. 202(e). The secondary premise is that the definition of the words "respirable dust," embodied in sec. 318(k) in terms of *linear*, microscopic size, is incompatible with the sampling method allegedly mandated by the Congress because the MRE and any equivalent device determine the levels of dust concentration on the basis of the *aerodynamic* size of particulates. We are told that linear microscopic size and aerodynamic size are wholly different measurements even though the

<sup>3</sup> Sec. 201(a) of the Act, 30 U.S.C. § 841(a) (1970) provides in pertinent part: "The provisions of secs. 202 through 206 of this title and the applicable provisions of section 318 of title III shall be interim mandatory health standards applicable to all underground coal mines until superseded in whole or in part by improved mandatory health standards promulgated by the Secretary under the provisions of sec. 101 of the Act." \* \* \* [Italics added.]

standard unit of each is said to be a "micron."

In our opinion, the major premise of this initial argument is inconsistent with the statutory language and the legislative history. Sec. 202(a) of the Act, 30 U.S.C. § 842(a) (1970), states that "\* \* \* samples shall be taken by *any device* approved by the Secretary and the Secretary of Health, Education and Welfare \* \* \*" (Italics added). That provision would have been superfluous if sec. 202(e) had been designed to require usage of an MRE instrument or equivalent sampling device. Furthermore, the Conference Committee in discussing sec. 202(e) specifically said: "\* \* \* Both the MRE and other devices must be approved by both Secretaries." House Comm. on Ed. and Labor, *Legislative History, Federal Coal Mine Health and Safety Act*, Comm. Print, 91st Congress, 2d Session, 1124. The Statement of the House Managers explaining the results of compromises in the Conference Committee is to the same effect. *Id.* at 1036. Both the Conference Committee and the House Managers wrote their reports against the background of a legislative history showing a discarded, early Senate version of the Act which made sampling by the MRE instrument mandatory in explicit terms and which did not contain a definition of "respirable dust." Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 91st Congress, 1st

Session, S. 355 at 61-62, S. 1094 at 56. If anything, the legislative history overwhelmingly suggests that the Congress specifically decided to divorce the standard from the sampler rather than to wed them so indissolubly that the two Secretaries would be tied to any particular system of sampling. Thus it seems to us that in sec. 202(e) Congress only sought to authorize sampling with the MRE or equivalent device and assumed that a method of refining the data would be applied to determine the average concentration of dust 5 microns in size or less.<sup>4</sup>

As to the secondary premise regarding the alleged incompatibility between sec. 318(k) and the method of sampling authorized in sec. 202(e), MESA refers to portions of the testimony of Dr. Corn, a duly qualified expert called by Eastern.

Among other statements of Dr. Corn, MESA cites the following from Tr. 332:

\* \* \* For years the pathologist couldn't explain 200 micron fibers in the lungs, how they get in, it's impossible; but, well, when they put them through these instruments, they saw the 200 micron fibers landing right next to the less 10 micron spheres. And what that was telling them was no matter what they look like, they settled in there comparable to the spherical particles.

Frankly, this statement even when read in context is barely intelligible,

<sup>4</sup> We think it was contemplated that if such a method did not exist or could not be developed and if it was determined that the MRE and the personal sampler should be used, Congress intended that rulemaking would take place to make whatever adjustments in the interim standards that were required. 30 U.S.C. § 811 (1970).

and it hardly demonstrates a hard and fast distinction between linear, microscopic size on the one hand, and aerodynamic size on the other, as MESA asserts.

MESA also relies on excerpts from Dr. Corn's testimony at Tr. 306-307. The quotations are drawn from direct examination by counsel for Eastern, Daniel Darragh, and read as follows:

A. \* \* \* We say anything greater than 10 microns will not get into the pulmonary compartment, and the dust hygienic consistence, aerodynamic equivalent diameter, the size of the sphere of Density 1, 10 microns or smaller.

\* \* \* \* \*

Q. \* \* \* Why would it have been or why was it that respirable dust was defined as five microns and less, and why were we concerned with that? I think you covered the first part of the inhalation. And why was it the five micron cut-off point?

A. To my knowledge, there are two cut-off points; a 10 micron associated with the Atomic Energy Commission served in this country, and the 7.1 micron associated with the British Medical Research Council curve. We start accepting particles which will get to the pulmonary compartment in varying proportions at either 10 microns or 7.1. Now, these two curves are slightly different. Five microns is in both of them, but I think I would say the dust hygienic significance is either of 10 microns or smaller; aerodynamic equivalent diameter, if you speak of the United States Atomic Energy Commission curve or 7.1 microns aerodynamic equivalent diameter and smaller if you speak of the British Medical Research Council acceptance curve. So that is the starting point. Those are the starting points for acceptance.

The response in this colloquy refer to an aerodynamic quality of dust

particles, but that reference is in relation to the word "diameter," and it is common knowledge that a "diameter" is a linear measurement, a fact which actually subverts MESA's argument. We see nothing in this exchange which proves MESA's point directly or indirectly.

Finally, MESA cites the following from the cross-examination of Dr. Corn by its counsel at Tr. 335:

Q. When we talk about respirable dust, then, are we talking about what is picked up by MRE?

A. When I speak for respirable dust, it's either the MRE; the cyclone. They're both respirable dust. If you ask me—

Q. Under the law I mean.

A. Under the law, I believe that the MRE defines it. That is my understanding of the law.

The question asked by counsel, as amended, called for an opinion on a point of law, an area beyond the witness' expertise and a matter as to which he was not competent to give testimony. Accordingly, the opinion given by Dr. Corn has neither evidentiary nor legal significance, and MESA's reliance upon it to demonstrate alleged incompatibility between the sampling system authorized in sec. 202(e) and the legislative definition of "respirable dust" is misplaced.

Other testimony in the record, apart from that given by Dr. Corn, suggests strongly that, contrary to MESA's assertion, linear, microscopic size is indeed relevant to sampling by the MRE instrument and personal sampler. As the majority pointed out previously, it is un-

contradicted that MESA subjects samples showing a net weight gain in excess of 6 milligrams to stereo microscopic analysis and eliminates those showing what it believes are excessive numbers of particulates larger than 10 microns in linear size. While the scientific bases for MESA's practices in this respect remain shrouded in obscurity, largely as a result of its meager evidentiary presentation, the obvious inferences that can be drawn from this evidence quite clearly are that the raw data produced by personal samplers are not taken at face value, and linear, microscopic size is related to the validity of any single sample.<sup>5</sup>

Before moving on to MESA's second argument, there is one more point to be made. The legislative history tends to refute MESA's factual assertion regarding the allegedly dual definition of the term "micron." As amicus BCOA pointed out in oral argument, the record of the legislative hearings from the House shows that at least one eminent English expert, Dr. Jethro Gough, was specifically asked by Representative Mink: "Is the mi-

cron measurement a size measurement or weight?" Dr. Gough replied: "That is a size measurement." See Hearings Before the Subcommittee on Labor of the Committee on Education and Labor, House of Representatives, 91st Congress, 1st Session, on H.R. 4047, H.R. 4295, and H.R. 7976, 651. One would suppose that if science were so imprecise as to have two entirely different definitions of a standard unit of measurement such as a "micron," then Dr. Gough would have mentioned such a fact in responding to Ms. Mink's query. And in any event, if there is such duality, there should have been direct expert evidence in the evidentiary record of this case to validate this as well as other undocumented assertions of fact in MESA's brief with regard to the sampling system.

MESA's second argument is a response to one of the reasons for the majority's refusal to ignore sec. 318 (k) and 30 CFR 70.2(i) and its determination to give those secs. the full meaning they were intended to have. MESA now insists, contrary to the majority's view, that there is ample judicial authority to support a judgment by the Board in effect reading both sections out of the Act and regulations, as appropriate. The significant authority put forward is a quotation from the decision of a three-judge district court in *C-Line, Inc. v. United States*, 376 F. Supp. 1043 (D. R.I. 1974) where the Court said, 376 F.Supp. at 1048:

The general principle of legislative construction is that statutory definitions control the meaning of words. See *Law-*

<sup>5</sup> In its latest brief, MESA argues that its practices with regard to this class of samples were designed " \* \* \* to check proper sampling techniques," and are not " \* \* \* directly related to weight gain \* \* \*." Supplemental Brief of MESA on reconsideration *en banc*, p. 16. We have no idea as to what MESA meant to convey precisely by this argument due to its conclusory and vague nature, and MESA did not refer to the evidence of record to support it.

We have given no weight to counsel's "testimonial" assertions at oral argument designed to rehabilitate testimony of the witness Parobeck as to the bases for MESA practices with regard to screening out invalid samples. See *Eastern Associated Coal Corp.*, *supra*, 7 IBMA 32-33, n. 14.

*son v. Suwannee Fruit and Steamship Co.*, 336 U.S. 198, 69 S.Ct. 503, 93 L.Ed. 611 (1949). An exception to this rule arises when a mechanical application of the statutory definition creates *obvious incongruities in the language of and destroys a major purpose of the Statute*. *Id.* When the application of the literal words would bring about a result inconsistent with the purpose of the statute, the judiciary may look to the legislative history to reach a conclusion. \* \* \* [Italics added.]

Having read both *Lawson* and *C-Line*, *supra*, we are of the opinion that neither of these cases is in point.

We perceive no obvious *linguistic* incongruity resulting from reading secs. 202 and 318(k) together that calls for application of the above-quoted principle of construction. Furthermore, both of those cases involve a situation where a court took an isolated liberty with a legislative definition by reading it *narrowly*, and did so because the only alternative to the particular frustration of the statutes involved was the impractical one of resort to the Congress for a curative, legislative amendment. The present case is not comparable because MESA is not merely asking us to read sec. 318(k) and 30 CFR 70.2(i) narrowly; MESA is importuning us to *emasculate* them *totally*, to treat them as if they virtually did not exist and could not be amended by rule-making.

A further point, serving to distinguish *C-Line* and *Lawson*, *supra*, from the case at hand is that, far from destroying a major purpose of the Act, the majority's judg-

ment, which we affirm today, is likely to have some constructive effects and none that is especially harmful. For one thing, even if we were willing to overlook the anemic quality of MESA's evidentiary presentation and the questionable nature of its legal theories with respect to sec. 318(k), 30 CFR 70.2(i), 30 CFR Part 74 and sec 101, we doubt that counsel for the operators would be beguiled by any sophistries designed to sustain the subject notices. The result of any misguided effort on our part to impose assessments based on the notices now before us is likely to be untold numbers of futile collection actions under sec. 109 (a)(4) of the Act, 30 U.S.C. § 819(a)(4) (1970), straining the patience and resources of severely pressed United States attorneys and select federal district courts. For another thing, should it be necessary to resort to rulemaking, a matter to which we alluded in the previous decisions, any hiatus in the issuance of notices under sec. 104 (i), if there is one, is unlikely to have a substantial impact on operator behavior. There is no indication in the record that operators will cease existing or projected efforts to reduce excessive concentrations of hygienically harmful coal dust particulates in the atmosphere of their mines especially since they know full well that the hiatus will be relatively brief and liability to pay compensation in new so-called "black lung" cases under Titles II and IV of the Act is continuing.

MESA's final argument against the majority's conclusions is an assertion that the Board is without authority to impose its own definition of "oversize particles" when none appears in the Act. This argument flows from MESA's unproved contentions with regard to the sampling system. Indeed in making this argument, MESA goes so far as to say that it is not under any legal obligation to compensate for weight gain attributable to any size particulate, no matter how large, but then undercuts that assertion by referring to its own practice of voiding some samples containing a number of particulates in excess of 10 microns. We reject this argument as a self-contradictory attempt to transmute a question of fact into a question of law.

Having dealt with and rejected MESA's arguments, we think one observation is worth making which we hope cuts through the complexities and places this controversy in some perspective. It is *uncontradicted* that MESA has been enforcing the respirable dust standards as if there were and has always been a legal obligation to suppress excessive levels of dust particulates larger than 5 microns. No one, by simply reading secs. 202 and 318(k) of the Act and 30 CFR Parts 70 and 74, could reasonably conclude that there ever was such an obligation, express or implied. Thus MESA has been asking the Board to assess civil penalties for noncompliance with a standard no one really knew existed. Congress never intended in enacting the mandatory standard program to authorize imposition of

statutory sanctions because of noncompliance with a *phantom* standard.

In sum then, we perceive no reason to overturn the prior majority judgment, and we hold that the subject 22 notices of violation were properly vacated.

### ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the motion by MESA to substitute corrected pages to its brief filed Oct. 28, 1976, IS GRANTED, and the decision of the Board in the above-captioned appeal on Sept. 30, 1976, 7 IBMA 14, 83 I.D. 425, 1976-1977 OSHD par. 21,195 (1976), IS AFFIRMED upon reconsideration *en banc*.

DAVID DOANE,

*Chief Administrative Judge.*

WE CONCUR:

LOUIS E. STRIEGEL,  
*Administrative Judge.*

DAVID TORBETT,  
*Alternate Administrative Judge.*

JAMES R. RICHARDS,  
*Director, Office of Hearings and Appeals.*  
*Ex-Officio Member of the Board.*

ADMINISTRATIVE JUDGE  
SCHELLENBERG,  
DISSENTING:

For the following reasons and for the reasons stated in the prior decision on reconsideration, I dissent.

December 20, 1976

My disagreement with the majority is that I believe too much emphasis is placed upon the definition of "respirable dust" and too little upon the primary health objective of the Act to attempt to reduce the rate of new cases of pneumoconiosis by reducing miners' prolonged exposure to dangerous concentrations of harmful dust, however it may be defined.

I am convinced that the dust standards are inextricably related to, and cannot be considered apart from, the MRE gravimetric sampling device having the following characteristics for particles of unit density spheres or its equivalent:

- 2 microns and less will pass 98 percent
- 5 microns will pass 50 percent
- 7.1 microns will pass 0 percent

These characteristics were specifically set out in earlier Senate versions of the Act (S. 355 and S. 1094). The importance of the characteristics of the MRE lies in what it will not do rather than what it does do. It does not trap (collect) 2 percent of the dust particles 2 microns and less and 50 percent of dust particles of 5 microns.

The standards set by Congress are based upon this measuring method and not *vice versa*. The legislative background on this point is overwhelming.

The point is graphically demonstrated by the testimony of Mr. James R. Garvey, Vice President of the National Coal Association

and President of Bituminous Coal Research, Inc. (Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare, U.S. Senate, Part 2, Mar. 12, 1969, pp. 571-599). *See also* the "Summary of Proposed Standards and Measurement Methods" submitted in the prepared statement of Mr. Garvey at p. 593 of the above-referenced Senate Hearings. This summary relates a specific standard to each method of measurement. Furthermore, at p. 598, when asked how the British standard compared with the proposed standard, Mr. Garvey replied in part "It is impossible to compare them at this time. The British are undertaking studies now to attempt to apply the MRE instrument, the gravimetric instrument which has been mentioned in several of the proposed bills, to apply this to their studies which they have had underway for about 15 years. *They do not use this instrument now as their basis for setting standards, \* \* \*.*" (Italics added.)

In sum, I am convinced that Congress in setting the respirable dust standards was fully aware of the collection characteristics of the MRE and that despite its obvious inadequacies mandated its use (or equivalent) for enforcement purposes to accomplish their desired objectives.

I respectfully dissent.

HOWARD J. SCHELLENBERG,  
*Administrative Judge.*

## KANAWHA COAL COMPANY

7 IBMA 158

Decided *December 21, 1976*

Appeal by United Mine Workers of America and Mining Enforcement and Safety Administration from a decision by Administrative Law Judge Joseph B. Kennedy, dated June 20, 1975, in Docket No. HOPE 75713, in which the Judge concluded that: (1) the time fixed for abatement of a violation of 30 CFR 71.300 was unreasonable; (2) the violation had been abated; and (3) the notice of violation in issue is terminated.

Decision set aside and Notice of Violation modified.

### 1. Federal Coal Mine Health and Safety Act of 1969: Applications for Review: Issues

An Administrative Law Judge may not decide an issue not properly raised in an Application for Review nor agreed upon by the parties unless it pertains to jurisdiction.

### 2. Federal Coal Mine Health and Safety Act of 1969: Notices of Violation: Reasonableness of Time

Where a pattern of granting extensions of time is established to permit step-by-step accomplishment of an approved noise-control plan, an additional extension of time granted in conformance with such pattern will not be held by the Board to be unreasonable.

**APPEARANCES:** Steven B. Jacobson, Esq., for appellant, United Mine Workers of America; Thomas A. Mascolino, Esq., Assistant Solicitor, and John D.

Austin, Jr., Esq., Trial Attorney, for appellant, Mining Enforcement and Safety Administration; and Edward W. Hall, Esq., and Harold Albertson, Esq., for appellee, Kanawha Coal Company.

### OPINION BY ADMINISTRATIVE JUDGE SCHELLENBERG

### INTERIOR BOARD OF MINE OPERATIONS APPEALS

#### *Factual and Procedural Background*

On Apr. 30, 1973, a Mining Enforcement and Safety Administration (MESA) inspector issued to Kanawha Coal Company (Kanawha) a notice of violation which stated that two employees in Kanawha's Madison Preparation Plant<sup>1</sup> were exposed to noise levels in excess of the mandatory health standard set forth in 30 CFR 71.300. This notice required the alleged violation to be totally abated by July 2, 1973. The requirements for abatement of such a violation are specifically set forth in 30 CFR 70.510 (incorporated by reference in 30 CFR 71.300) which states:

(b) Upon receipt of a Notice of Violation \* \* \* the operator shall:

(1) Institute promptly administrative and/or engineering controls necessary to assure compliance with the standard.\* \* \*

(2) Within 60 days following the issuance of any Notice of Violation of this

<sup>1</sup> The Madison Preparation Plant was designed in late 1968 and early 1969, construction commenced in late 1970, and the plant started operating in July of 1972.

December 21, 1976

subpart, submit for approval to a joint Mining Enforcement and Safety Administration—Health, Education and Welfare committee, a plan for the administration of a continuing, effective hearing conservation program to assure compliance with this subpart, including provision for:

- (i) Reducing environmental noise levels;
- (ii) Personal ear protection devices to be made available to the miners;
- (iii) Preemployment and periodic audiograms.

\* \* \* \* \*

In conformance with 30 CFR 70.510(b)(2) on May 7, 1973, Kanawha submitted a plan to MESA which indicated that it was seeking assistance from the builders of the plant to reduce environmental noise levels, that it had made personal ear protective devices available to the miners, and that it was setting up a program of pre-employment and annual audiograms. On Nov. 9, 1973, MESA issued a notice extending the time for abatement of the violation to Nov. 16, 1973, in order for a specific plan to be submitted.

On Nov. 21, 1973, another notice extending the time for abatement to Jan. 14, 1974, was issued by MESA on the ground that a plan was submitted and approval was awaited. On Dec. 12, 1973, the Joint MESA—HEW committee approved the May 7 plan with the condition that a supplemental noise survey indicate that the control measures to be instituted will reduce noise exposure levels to within acceptable limits.

On Jan. 17, 1974, a notice was issued by MESA which extended the time for abatement to Feb. 28, 1974, in order for Kanawha to submit a supplemental noise survey. This survey was performed on Jan. 24 and the results showing noncompliance with the permissible noise exposure levels were submitted to MESA. Following receipt of the results MESA issued another notice extending the time for abatement to May 1, 1974, and requiring submission of a revised plan.

On Apr 30, 1974, Kanawha submitted to MESA a revised plan which included six engineering controls<sup>2</sup> to decrease the noise levels as well as stating that a specific personal ear protection device was made available to its employees and that audiograms for each miner exposed to excessive noise levels had been arranged. On May 3, 1974, this revised plan was approved by MESA with the proviso that a supplemental noise survey indicates that the control measures to be applied, as stated in the plan, do reduce the noise levels to within acceptable limits.

On May 3, 1974, another notice was issued by MESA which extended the time for abatement to

<sup>2</sup> The engineering controls included: (1) Line the coarse coal chutes at impact points with sound retardant material; (2) wrap or spray the exposed side of the coarse coal chutes with sound retardant material; (3) use rubberized screens for the clean coal screens where necessary; (4) enclose vacuum pumps with sound retardant material; (5) enclose the stairwells where it is needed; and (6) cover openings in the floors with sound proof material where improvements in sound reduction can be attained.

June 14, 1974, in order to permit implementation of the revised plan. On June 14, 1974, another notice was issued by MESA which extended the time for abatement to July 31, 1974, on the ground that "a consultant has been called in to make recommendations as to type of material needed to reduce noise levels in the preparation plant, and to fulfill the stipulations of the approved plans" and that "work will start immediately as this information is made available to the company." On Aug. 6, 1974, another notice was issued by MESA which extended the time for abatement to Sept. 6, 1974, in order for Kanawha to submit a time schedule for completion of the engineering controls contained in its revised plan.

On Aug. 7, 1974, Kanawha submitted a time schedule indicating that each step of the six engineering controls would require approximately 1 month to complete, and the entire plan would be completed by Feb. 10, 1975. On Sept. 23, 1974, another notice was issued by MESA which extended the time for abatement to Oct. 25, 1974, because a work stoppage had prevented implementation of the plan. On Nov. 4, 1974, another notice was issued by MESA which extended the time for abatement to Dec. 4, 1974, on the ground that the material to be used in the plan was not flame resistant and which required the operator to contact an acoustical noise consultant and enter into a contract to reduce the noise levels. On Jan. 9, 1975, another notice was issued by MESA which extended the time for

abatement to Feb. 6, 1975, in order for the noise consultant to finish its engineering survey and submit its report to Kanawha.

On Feb. 18, 1975, another notice was issued by MESA which extended the time for abatement to Mar. 18, 1975, which noted that Kanawha had received the noise consultant's report, and which required submission of a plan outlining work to be done and a schedule for completion. On Mar. 15, 1975, Kanawha submitted the required time schedule which stated in pertinent part:

1. Line the coarse clean coal chutes from floor five thru floor three, with Minaloy material, to where the coal enters the C.M.I. centrifugal dryers. Check for noise reduction and proceed to Step 2 if satisfactory. If not satisfactory, we will try another type material and check its results. Estimated original completion is Mar. 18, 1975.

\* \* \* \* \*

On Mar. 19, 1975, Kanawha filed an Application for Review of the Feb. 18 Notice of extension of time, and the Application stated that the subject Notice did not allow sufficient time within which to abate the violation charged and requested that the notice be extended to reflect more fully the amount of time required to complete the suggestions presented in the noise control report.

On Apr. 3, 1975, a notice was issued by MESA which noted that Step 1 has been completed and more time was required to complete the remaining steps and extended the time for abatement to May 4, 1975. On May 8, 1975, another notice was

issued by MESA which noted that Kanawha had relined the coarse clean coal chutes with another material and was ready to proceed with Step 2, and extended the time for abatement to June 9, 1975.

On May 12, 1975, the Administrative Law Judge (Judge) held a pre-hearing conference in the instant case at which Kanawha stated that it did not desire to continue implementation of the existing, approved plan and would submit a new plan which provided for the use of personal ear protection devices and no engineering controls. The Judge ordered Kanawha to submit the new plan to MESA and upon receiving MESA's answer he would set the time for hearing. On May 14 the new plan was formally submitted and on May 15 MESA rejected the plan for reasons that: (1) information concerning specific engineering control measures was lacking; (2) information concerning specific administrative controls was lacking; and (3) a plan has been approved for this violation, but has not been fully implemented. On May 22, 1975, the Judge issued a notice of hearing setting the time and place for an expedited hearing and describing the principal issue to be determined as "whether the operator is entitled to have the outstanding sec. 104(b) Notice of Violation of 30 CFR 71.300 terminated on the ground that its alternate comprehensive hearing conservation plan has effectively abated the alleged violation."

On May 27, 1975, MESA filed a motion to dismiss the application for review on the grounds that: (1) Kanawha was seeking review of the original notice of violation and its application was, therefore, untimely; and (2) the only issue which may validly be raised was the reasonableness of the time fixed for abatement and that the issue set forth in the Notice of Hearing was an issue which a Judge lacks authority to consider. On May 29, 1975, the Judge denied the motion to dismiss and stated that the only issues to be heard at the expedited hearing would be the issue set forth in his Notice of Hearing and the issue of whether, if the alternate plan does not abate the violation, the time allowed for implementation of the approved plan was reasonable.

The expedited hearing was held on June 3-6 (1975), in Charleston, West Virginia, at the conclusion of which the Judge made findings of fact and conclusions of law on the record. He also entered an order terminating the Apr. 30, 1973, Notice of Violation. In a written decision issued June 20, 1975, the Judge recited the following findings, conclusions, and order:

1. Except as noted below, it is impossible to reduce the noise exposure of miners working the Madison Preparation Plant below 90 decibels over an 8 hour period by any method, means, technique or technology presently available to the operator.

2. That under the present state of knowledge available to MESA and the operator, the only effective method for protecting the miners from exposure to

excessive noise levels is the personal ear protective device presently provided the miners.

3. That use of this device by the miners at the Madison Preparation Plant in accordance with the operator's plan (OX-1), as described in the record, has effectively reduced the noise level to which the miners are exposed to less than 90 dba as required by 30 CFR 71.300 and will continue to reduce said noise level and to protect the miners until such time as MESA and the operator can agree upon means, methods, techniques or technology to permit the operator to abate the environmental noise at its source.

4. That use of the personal ear protective devices provided the miners at the Madison Preparation Plant is not hazardous and does not cause a hazard to the miners within the meaning of sec. 206 of the Act.

5. That the time for abatement under the outstanding Notice was and is unreasonable because the abatement plans approved by MESA were, as the record shows, impossible to implement within the time frames approved.

For these reasons, I conclude that the time for abatement was unreasonable and that the condition cited has been abated.

#### *Order*

Accordingly, it is ORDERED that Notice No. 1 JTL as extended be, and hereby is, terminated. It is FURTHER ORDERED that said findings, conclusions and order be, and hereby are, CONFIRMED and that in accordance with said order the captioned notice of violation be, and hereby is, deemed terminated effective June 6, 1975.

Both the United Mine Workers of America (UMWA) and MESA filed timely appeals from the decision of the Judge. In their supporting briefs, MESA and UMWA charge that the Judge exceeded his authority when he considered

whether the alternate plan abated the violation and when he terminated the Apr. 30, 1973, Notice of Violation. Kanawha replied that the decision of the Judge was valid in all respects. Oral argument was held before the Board on Nov. 10, 1975, in Arlington, Virginia.

#### *Issues Presented*

A. Whether the Judge erred in considering the alternate hearing conservation plan rejected by MESA.

B. Whether the time fixed for abatement in the February 18 Notice was reasonable.

#### *Discussion*

##### A.

[1] The Board is of the opinion that much confusion has arisen in this case from the Judge's action in setting the issues to be tried. In *Eastern Associated Coal Corporation*, 4 IBMA 1, 14, 82 I.D. 22, 28, 1974-1975 OSHD par. 19,244 (1975), the Board held,

There is nothing in the powers expressly or impliedly granted to Administrative Law Judges which authorizes a Judge to deal with matters not raised by parties in interest \* \* \*. Moreover, the regulations clearly do not authorize a Judge to treat an Application for Review as a procedural opportunity to pass judgment on the actions or omissions of MESA which are not challenged or to grant relief which is not sought. \* \* \*.

The issue of whether implementation of the alternate plan effectively abated the violation as set forth both in the May 22 Notice of Hearing

and May 29 Order Setting Issues to be Tried was an issue neither raised by Kanawha's Application for Review nor agreed upon by the parties. Further, it was an issue objected to by MESA in its May 27 Motion to Dismiss, and subsequently objected to at the evidentiary hearing. *See Old Ben Coal Company*, 6 IBMA 294, 83 I.D. 335, 1976-1977 OSHD par. 21,094 (1976). Accordingly, we are of the opinion that the Judge exceeded the limits of his authority in considering this issue and, consequently, erred. Therefore, it is necessary for the Board to set aside the Judge's decision.

B.

[2] Inasmuch as Kanawha's alternate plan was and is not a proper subject for consideration in the proceeding, this case devolves into a consideration of whether the time fixed for abatement in the notice of violation dated February 18, 1975, was reasonable. Based upon the record facts as set forth below, and the historical background previously recited, the Board is of the opinion that the time given in the notice under review was reasonable. The Board finds and concludes that: (1) the plan approved by the Joint MESA-HEW Committee was devised by Kanawha; (2) the step-by-step time schedules for implementation of its plan were conceived and adopted by Kanawha; (3) MESA has been reasonable and fair in permitting Kanawha to devise its own plan and time schedule and in al-

lowing whatever time Kanawha indicated was necessary to implement the plan; and (4) it is apparent that only after receipt of the report of the builders of the preparation plant as to the cost and time required for implementation of the engineering controls part of the approved plan did Kanawha seek consideration of its alternate plan.

It is clear that MESA and Kanawha developed an arrangement whereby MESA was granting extensions of time within which to abate, on a step-by-step basis, upon the representations of Kanawha of the time frame required for accomplishment of each step of the approved plan. This pattern of conduct was further verified by the two extensions of time granted by MESA, subsequent to the filing of the application for review by Kanawha. Under these circumstances, the Board cannot conclude that the time for abatement as extended in the subject February 18 notice was unreasonable.

Due to the period of time which has elapsed since the Judge issued his decision and the confusion which has resulted from the erroneous determination of the issue at the hearing level, the Board deems it appropriate to modify the subject notice, issued Feb. 18, 1975, to extend the time for abatement for an additional 60 days from the date of the publication of this decision in order to permit MESA and Kanawha to reach a realistic agreement on implementation of the approved

plan. This action is intended to permit MESA and Kanawha to achieve compliance with the approved plan without prejudice to MESA to permit such further extensions as may be required.

### ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision of the Judge in the above-captioned case IS SET ASIDE, and that Notice of Violation No. 1 HHR, issued Feb. 18, 1975, IS REINSTATED and MODIFIED to extend the time for abatement for another 60 days from the date of this decision without prejudice to the granting of such further extensions by MESA which may be necessary for implementation of an approved noise-control plan for the preparation plant of Kanawha.

HOWARD J. SCHELLENBERG, JR.,  
*Administrative Judge.*

WE CONCUR:

DAVID DOANE,  
*Chief Administrative Judge.*

DAVID TORBETT,  
*Alternate Administrative Judge.*

JACK W. PARKS v. L & M COAL  
CORPORATION

7 IBMA 172

Decided December 23, 1976

Appeal by L & M Coal Corporation  
from an initial decision by Adminis-

trative Law Judge Joseph B. Kennedy in Docket No. NORT 75-377 granting relief based upon an application for review of an alleged discriminatory discharge under sec. 110(b) of the Federal Coal Mine Health and Safety Act of 1969.

Set aside and remanded to the Chief Administrative Law Judge.

### 1. Federal Coal Mine Health and Safety Act of 1969: Hearings: Powers of Administrative Law Judges

An Administrative Law Judge may sequester witnesses upon proper motion, but he may *not generally* preclude an attorney from consulting with a willing witness. 43 CFR 4.582.

### 2. Federal Coal Mine Health and Safety Act of 1969: Hearings: Powers of Administrative Law Judges

In a case, where the record shows that an Administrative Law Judge has clearly and grossly abused his discretion to the prejudice of both parties by undue and improper interrogation of witnesses and unnecessary interference in the presentation of a case, the Board may grant a new hearing before another trier of fact. 43 CFR 4.608.

APPEARANCES: Eugene V. Lohman, Esq., for appellant, L & M Coal Corporation; Richard L. Trumka, Esq., for appellee, Jack W. Parks.

OPINION BY ALTERNATE  
ADMINISTRATIVE JUDGE  
TORBETT

INTERIOR BOARD OF MINE  
OPERATIONS APPEALS

Sec. 110(b)(1)(A) of the Federal Coal Mine Health and Safety Act of 1969 prohibits an operator

December 23, 1976

from discharging a miner " \* \* \* by reason of the fact that such miner \* \* \* has notified the Secretary or his authorized representative of any alleged violation or danger \* \* \*." 30 U.S.C. § 820(b)(1)(A) (1970). Claiming that he had been the victim of just such a discharge by L & M Coal Corporation (L & M) and seeking reinstatement and back pay, Jack W. Parks instituted these proceedings by applying for review under sec. 110(b)(2), 30 U.S.C. § 820(b)(2) (1970). By decision dated June 10, 1976, Administrative Law Judge Joseph B. Kennedy found merit in Parks' claim and granted extensive relief.

Charging that the Judge committed a number of prejudicial errors in adjudicating this case, L & M appeals to us to reverse the decision below, or in lieu thereof, to remand to another Administrative Law Judge for a new hearing. L & M contends: (1) that the Judge erred at the outset of the hearing in precluding Mr. Winfred Lanningham, part owner of L & M, from communicating with counsel for L & M on a critical issue pending the Judge's further order; (2) that he erred by interrupting the questioning of witnesses with improper and in many instances leading inquiries of his own which assisted Parks; and (3) that he erred by finding a violation of sec. 110(b) as alleged in light of the substantial evidence of record considered as a whole.

Having carefully considered the record, we are of the opinion that the Administrative Law Judge did abuse his discretion in ordering Mr.

Lanningham and counsel for L & M not to communicate with each other, and further, that he did unduly participate in the examination and cross-examination of witnesses generally and with leading and suggestive inquiries. Largely on account of the gross prejudice to the fact-finding process flowing from the latter error and affecting *both* parties, and to avoid the continuance of such prejudice into a new hearing, we are setting aside the decision below and remanding this case to the Chief Administrative Law Judge for fresh, expedited consideration and hearing by him or by another Administrative Law Judge, as he deems appropriate. As a result of the damage done by undue interference below in the presentation of evidence, unmatched in our previous experience, we are unable to reach any conclusion as to L & M's third assignment of error, and consequently, we cannot say whether L & M discharged Parks in violation of the restrictions in sec. 110(b)(1) with respect to operator discretion over the tenure of employment.

#### *Procedural and Factual Background*

L & M is a corporation closely held by Winfred L. Lanningham and Royce Moore. L & M owns and operates the mine which was the situs of the present controversy, the L & M No. 2 Mine.

The representative of miners and collective bargaining agent for the miners employed by L & M at the

subject mine is the United Mine Workers of America (UMWA). At times pertinent to this case, the relationship between L & M and the UMWA was governed largely by the National Bituminous Coal Wage Agreement of 1974 (the 1974 Contract).<sup>1</sup>

The operating history of the L & M No. 2 Mine immediately prior to Parks' discharge on May 19, 1975, was troubled from both the safety and economic points of view. On Feb. 24, 1975, L & M experienced a double fatality at the subject mine as a result of a roof fall. Following these deaths, the mine remained closed until Mar. 18, 1975. With the approval of the Mining Enforcement and Safety Administration (MESA), L & M reopened the mine under an altered roof control plan with stiff roof bolting requirements. The new operating procedures reduced daily tonnage, a reduction which had an impact on the economic viability of the mine. In addition and as a result of the roof fall, MESA was inspecting the L & M No. 2 Mine once every 5 days on a random basis and without warning (Arbitrator's Transcript, hereinafter referred to as AT, 124-125, Tr 328-329).

Parks was hired by L & M on or about Apr. 8, 1974, but prior to that time he had been in the employ of the Westmoreland Coal Company where he had been a member of the Safety Committee, just as he was a member of a similar committee at

the subject mine. On Oct. 2, 1973, he was discharged by Westmoreland on account of alleged unexcused absences in violation of the irregular work provisions of Article XVI, sec. (i) of the National Bituminous Coal Wage Agreement of 1971, hereinafter referred to as the 1971 Contract (Respondent's Exhibit, hereinafter referred to as RX, 1).<sup>2</sup> Subsequently, Parks complained of his discharge to an arbitrator under the 1971 Contract and to the National Labor Relations Board (NLRB), respectively. An arbitrator concluded that the discharge was not discriminatory under the pertinent contractual provision and the NLRB found no merit in his complaint (RX 1, AT 114). Parks never informed L & M of the facts concerning his employment and discharge by Westmoreland

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<sup>2</sup> Article XVI, section (i) of the 1971 Contract appears word for word in Article XXII, sec. (i) of the 1974 Contract and provides as follows: "When any Employee absents himself from his work for a period of two days without the consent of the Employer, other than because of proven sickness, he may be discharged."

We observe in passing that the 1974 Contract appears in the record as an exhibit, AX-1. The integrity of this exhibit, as well as a number of other exhibits and documents filed by counsel, is in doubt because phrases have been underlined and on occasion an apparent transcript cross-reference has been made, AX-11. If these exhibits and documents were not received with such extraneous markings, then such markings were probably made by Judge Kennedy or someone working under his supervision. If such is the case, these markings constitute defacement of the record. They have not become an issue, probably because counsel for the parties are unaware of their existence. Upon remand, we expect the Administrative Law Judge to provide to counsel an opportunity to examine the official case file in his presence and to deal with any motions or stipulations which result from such examination. See n. 3, *infra*.

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<sup>1</sup> A copy of the provisions of the 1974 Contract appears in the record as Applicant's Exhibit, hereinafter referred to as AX-1.

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(Arbitrator's Decision, hereinafter referred to as AD, 14).

During Parks' employment by L & M, a period extending from Apr. 8, 1974, through May 19, 1975, he was absent a substantial percentage of the time. Although the bulk of his absences were excused, a significant portion thereof were not. The Administrative Law Judge found that approximately 22 percent of his 1974 absences fell into the latter category. Indeed Parks was warned once and suspended once on account of those absences.

From Jan. 3, 1975, through Mar. 31, 1975, Parks was on sick leave due to hospitalization and convalescence as a consequence of gall bladder surgery. Following release by his physician, Parks was on layoff status pending the reopening of the mine and recall on the basis of seniority. Despite the restrictions on his physical activity, Parks continued to fulfill responsibilities as a member of the Safety Committee, and on Feb. 25, 1975, he participated in MESA's inspection of the L & M No. 2 Mine following the aforementioned double fatality.

Apart from the Feb. 25 inspection, Parks was personally involved in only one other event of significance during his convalescence. On or about Mar. 12, 1975, Parks had occasion to be at an establishment known as the Driftwood Drive-Inn and Restaurant with his wife for dinner. By coincidence, Winfred Lanningham and Royce Moore, owners of L & M, were also there, together with L & M's Safety Di-

rector, Lannie Gilbert. Out of the earshot of his wife, Parks had a conversation with these three men. The actual speakers and the content of the statements made, as well as their significance, were the subjects of conflicting evidence in this case.

L & M recalled Parks to work on Friday, May 2, 1975, asking that he report to the mine on the succeeding Monday, May 5. That same day, May 2, L & M experienced a walk-out at the subject mine by miners who were fearful of existing roof conditions and disputed the roof control procedure L & M intended to follow in further mining of the working section in question. The miners who walked off the job apparently did not act in accordance with Article III, section (i) of the 1974 Contract.<sup>3</sup>

<sup>3</sup> Article III, section (i), provides as follows:

"(1) No Employee will be required to work under conditions he has reasonable grounds to believe to be abnormally, and immediately dangerous to himself beyond the normal hazards inherent in the operation, which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated. When an Employee in good faith believes that he is being required to work under such conditions, *he shall notify his supervisor of such belief*. Unless there is a dispute between the Employee and management as to the existence of such condition, steps shall be taken immediately to correct or prevent exposure to such condition utilizing all necessary Employees, including the involved Employee.

"(2) If the existence of such condition is disputed, the Employee shall have the right to be relieved from duty on the assignment in dispute. Management shall assign such Employee to other available work not involved in the dispute; and the Employee shall accept such assignment at the higher of the rate of the job from which he is relieved and the rate of the job to which he is assigned. The assignment of such alternative work shall not be

Footnotes continued on following page.

Following the walkout, and during the weekend, several of the involved miners contacted Parks with details of the roof control dispute. On Monday, May 5, 1976, Parks

(Continued)

used to discriminate against the Employee who expresses such belief. If the existence of such condition is disputed, at least one member of the Mine Health and Safety Committee shall review such condition with mine management within four (4) hours to determine whether it exists.

"(3) If the dispute involves an issue concerning compliance with federal or state mine safety laws or mandatory health or safety regulations, the appropriate inspection agencies shall be called in immediately and the dispute shall be settled on the basis of the inspectors' findings, with both parties reserving all rights of statutory appeal. Should the federal or state inspectors find that the condition complained of requires correction before the Employee may return to his job, the Employer shall take the corrective action indicated immediately. Upon correction, the complaining Employee shall return to his job. *If the federal or state inspectors do not find a condition requiring correction, the complaining Employee shall return to his job immediately.*

"(4) For disputes not otherwise settled, a written grievance may be filed, and the dispute shall be referred immediately to arbitration. *Should it be determined by an arbitrator that an abnormally unsafe or abnormally unhealthy condition within the meaning of this section existed, the Employee shall be paid for all earnings he lost, if any, as a result of his removing himself from his job.* In those instances where it has been determined by an arbitrator that an Employee did not act in good faith in exercising his rights under the provisions of this Agreement, he shall be subject to appropriate disciplinary action, subject, however, to his right to file and process a grievance.

"(5) None of the provisions of this section relating to compensation for Employees shall apply where the Employer withholds or removes an Employee or Employees from all or any area of a mine, or where a federal or state inspector orders withdrawal or withholds an Employee or Employees from all or any area of a mine. However, this section is not intended to waive or impair any right to compensation to which such Employees may be entitled under federal or state law, or other provisions of this Agreement.

"(6) *The provisions of this section shall in no way diminish the duties or powers of the Mine Health and Safety Committee.*"

The italicized portions appear in the original case file copy. RX-1. See n. 2, *supra*.

did not go to work. He called the mine office and spoke with one Odie Ridings, an endloader operator who is a fellow miner and not a member of L & M's management. Parks asked Ridings to relay a message explaining his absence to the mine superintendent, Robert Lanningham, a message which was received. Ridings did not testify at either the arbitration proceeding or before the Administrative Law Judge, and there are differing statements of record as to the precise content of the relayed message.<sup>4</sup>

Although the record contains conflicting evidence as to the precise nature and sequence of events during the crucial week of May 5 through May 9, it is undisputed that on the former date, Parks, acting in his capacity as a safety committeeman, complained to MESA regarding L & M's alleged noncompliance with its roof control plan and requested an inspection. Following up on Parks' complaint and acting without warning, two MESA inspectors arrived at the

<sup>4</sup> Parks testified to a confrontation he allegedly had with management at the mine on May 5, 1975, on the subject of roof control plan compliance. At the conclusion of a lengthy description of this alleged meeting and in the course of relating what he said to one of the Lanningshams, Parks testified: " \* \* \* And I told him I figured we had exhausted every avenue as far as rectifying the problem and we no \* \* \* I had no alternative but to call the Federal mine inspector. This I proceeded to do" (Tr. 147). At n. 30, p. 30, of his decision, the Judge acknowledged that the evidence was in conflict as to whether this alleged meeting took place on May 5. The above-quoted portion of Parks' testimony indicates to us that the alleged meeting had to have taken place on May 5, if it took place at all. The Judge should have determined whether that meeting took place and whether Parks' description thereof was corroborated in detail and was believable.

subject mine the following day, Tuesday, May 6, and conducted an inspection together with two inspectors representing the State of Virginia. There is no question that the state inspectors informed L & M specifically that the inspection was taking place as a result of Parks' complaint (Tr. 70-71). The inspectors found that L & M was fully in compliance with its roof control plan.

Parks did not return to work for the remaining 3 days of the week following the Tuesday inspection. He did, however, unquestionably appear at the mine on Friday, May 9, at which time he acted as the spokesman for a group of miners in a meeting with Winfred Lanningham which apparently took place at the subject mine. At this meeting, compliance with the roof control plan was a prime topic of discussion. Following the close of that meeting, Lanningham handed Parks a notice of suspension pending discharge.<sup>5</sup> That notice cited

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<sup>5</sup> There is some question as to Parks' efforts, or rather, the lack thereof, to determine the results of the inspection between May 6 and May 9. Parks claims to have been at the mine on Wednesday, May 7, and observed nothing on the mine bulletin board which resulted from the previous day's inspection. However, the mine superintendent, Robert Lanningham, testified that the inspection results were posted immediately on the afternoon of May 6 (Tr. 190, 410-415). It is possible but unlikely that Parks and Lanningham can both have been telling the truth.

The Judge seems to have believed Lanningham (Dec. 32), but did not deal with the credibility implications for Parks of that determination. The Judge's observation that Parks " \* \* \* knew or should have known of the outcome of the inspection sometime Tuesday afternoon \* \* \*" simply glossed over the discrepancy.

Parks' refusal to work during the week of May 5. Discharge took place on May 19, 1975.

Responding to his suspension, Parks commenced a grievance proceeding on May 14, 1975, alleging discrimination under the 1974 Contract. Sometime thereafter, on June 3, 1975, without counsel, he filed the subject application for review in the form of an affidavit. 43 CFR 4.560, 4.561.

Following the failure of L & M to file a timely answer to Parks' application, as is mandatory under 43 CFR 4.563, the Chief Administrative Law Judge of Hearings Division issued an order to L & M requiring it to show cause for the failure to answer and for withholding the relief requested in view of that failure.

On July 28, 1975, L & M filed a copy of the arbitrator's decision of July 1, 1975, denying Parks' grievance challenging his discharge under the 1974 Contract.

By motion filed Aug. 26, 1975, Parks, acting by counsel, asked that the relief requested be summarily granted on the ground that L & M failed to comply with the aforementioned show cause order.

On Aug. 29, 1975, the Administrative Law Judge gave notice to the parties of his assignment as the trier of fact, and among other things, directed L & M to file a notice by Sept. 5, 1975, specifying the person who would represent it.

By order dated Sept. 3, 1975, the Administrative Law Judge denied Parks' motion for summary granting of his application for review.

Despite the specific requirements of 43 CFR 4.563, he chose to treat the arbitrator's decision filed by L & M as an answer and concluded that there was good cause shown for the failure to timely answer. Parks has not challenged the propriety of the Judge's ruling on appeal.<sup>6</sup>

Counsel for L & M filed an appearance by telegram on Sept. 4, 1975.

By order issued Sept. 9, 1975, the Judge required the filing by each party of a preliminary statement of the issues of fact and law to be tried and the relief requested.

Parks filed his preliminary statement on Sept. 17, and among other things, requested punitive damages in the amount of \$10,000. Subsequently, Parks filed a supplementary preliminary statement devoted exclusively to the question of punitive damages. The latter statement was served on Sept. 26, 1975, 43 CFR 4.509(b), but was *not* stamped with a filing date. According to the introductory remarks at the outset of the supplementary statement, counsel for Parks prepared it in response to a request by the Administrative Law Judge. The record does not show the manner in which this request was communicated; nor does it show whether L & M was apprised thereof prior to receiving Parks' supplementary statement in the mail.

L & M filed its preliminary statement on Sept. 29, 1975, having previously served it by mail on Sept. 24.

The Administrative Law Judge held an evidentiary hearing on Parks' application on Sept. 30, 1975, and Oct. 1 and 2, 1975, at Big Stone Gap, Virginia. Posthearing proposed findings of fact and conclusions of law were subsequently filed by Parks and L & M on Dec. 29, 1975, and Jan. 12, 1976, respectively. The evidentiary hearing and posthearing filings reflect a significant widening of the scope of the controversy which had occurred in the hearing. In his application for review, Parks had alleged in substance that he had been discharged on account of his exercise of the protected right to notify an authorized representative of the Secretary at various times of any alleged violation or danger. 30 U.S.C. § 820(b)(1)(A) (1970). At the hearing, evidence was adduced to show that Parks' discharge was partially due to retaliation for an allegedly good faith refusal to work on account of any violation of the existing roof control plan. At the hearing and again in his posthearing submission, Parks claimed that such a refusal was his right under sec. 110(b)(1) of the Act.<sup>7</sup>

<sup>6</sup> Sec. 4.563 of 43 CFR provides as follows:  
"Within 20 days after the date of service of such application, the operator shall file an answer *which shall respond to each allegation of the application.*" [Italics added.]

<sup>7</sup> Since we are not reaching the merits here, we express no views as to whether there is such a protected right under sec. 110(b)(1) to refuse to work. Whether there is such a right under the Labor Management Relations Act, as amended, is of course a matter within the exclusive jurisdiction of the NLRB. See 29 U.S.C. § 143 (1970).

As we indicated earlier, the Administrative Law Judge issued his decision on June 10, 1976. He concluded that, in discharging Parks, L & M violated its contractual obligations under the 1974 Contract and its legal obligations under sec. 502 of the Labor Management Relations Act, *as amended*, 29 U.S.C. § 143 (1970), and sec. 110(b)(1) of the Act, 30 U.S.C. § 820(b)(1) (1970) (Dec. 33). Without referring to an arbitration transcript apparently taken into account, the Judge certified the record on July 2, 1976, with the following statement:

I hereby certify that the attached official file, containing the pleadings and papers filed by the parties, the official transcript of hearing, with exhibits, and the Decision of the undersigned, dated June 10, 1976 constitute the official and complete record in the captioned proceedings, and hereby ORDER that said official record be filed in the Office of Hearings and Appeals.<sup>8</sup>

<sup>8</sup> Following the close of the evidentiary hearing on Oct. 2, 1975, and before the issuance of the decision below on June 10, 1976, the Judge apparently contacted the parties for the purpose of eliciting further evidence. Apparently responding to one of these requests on Feb. 26, 1976, counsel for L & M filed a copy of the transcript of the arbitration proceeding, which grew out of Parks' discharge, under a cover letter dated Feb. 24, 1976, a copy of which apparently was not sent to counsel for Parks. The record does not show that counsel for Parks was apprised of this request or of the filing of the transcript prior to its receipt by the Administrative Law Judge. Following receipt of that transcript, the Judge did telephone counsel for Parks to secure his agreement to consideration of the arbitrator's transcript as part of the record. A letter from counsel for Parks to the Judge, dated Feb. 27, 1976, indicates that the Judge contacted counsel for permission to use the transcript after receiving it, and that letter reads as follows:

"This will confirm our telephone conversation of this date in which I agreed to permit

L & M timely filed a Notice of Appeal with the Board on July 1, 1976.

Parks responded by moving the Board to modify the effective date of the decision below, 43 CFR 4.594, or in the alternative, to grant temporary relief. Oral argument on the record with respect to Parks' motion was heard by the undersigned panel on Aug. 13, 1976.<sup>9</sup> At that hearing, counsel stipulated that the certified copy of the arbitration proceeding could be considered as a part of the record (Transcript of Oral Argument, p. 3, Aug. 13, 1976). *See* n. 8, *supra*. In

you to consider the transcript of Jack Parks' discharge arbitration case. However, as I indicated to you at that time, since you received a copy from Gene Lowman [*sic*], counsel for the company without my being able to see it, the permission is conditioned on the authenticity and the lack of markings or other highlighting that could make the Transcript 'arguable.'

"Inasmuch as your integrity is beyond dispute, I agreed that you should be the sole judge of both of these matters." The Judge never replied to that letter. Although the cover letter of counsel for L & M appears in the record, the copy of the transcript to which that letter and the above-quoted letter refer is not in the official record. There is, however, a "certified" copy of the arbitration transcript which was transmitted to the Board with the record. The certificate is dated Mar. 23, 1976, as is a covering transmittal sheet specifically addressed to the Judge. There is no filing date or mark of a docketing stamp on this copy, and there are no entries on the docket card referring to receipt of any copy of the arbitration transcript. It is thus unclear exactly how the certified copy came to be in the case file. Furthermore, it is also unclear whether, in referring to the arbitration hearing in the initial decision now before us, the Judge was using the copy apparently filed on Feb. 26, 1976, or the unmarked certified copy which somehow found its way into the case file on or about Mar. 23, 1976."

<sup>9</sup> Oral argument was ordered on Aug. 24, 1976. At the same time, we ordered expedited consideration *sua sponte*.

a Memorandum Opinion and Order released on Sept. 30, 1976, the Board denied Parks' motion in both respects.

In separate motions, Parks also moved the Board to require prejudgment security and to correct the record. The Board denied the former by order dated Oct. 28, 1976, on the ground that there was neither statutory nor regulatory authority to grant such a motion. We are now granting the latter which involves changes in the transcript of the hearing below that are not particularly important to the outcome of this appeal.

Timely briefs were filed by L & M and Parks on Aug. 12 and Sept. 2, 1976, respectively. Parks' brief was 20 pages in excess of the regulatory limit of 25 pages, and he moved for permission to exceed that limit, a motion which L & M did not oppose and which we are granting. 43 CFR 4.601(d). Parks submitted a supplemental brief without permission or objection on Sept. 20, 1976.

### *Issues on Appeal*

A. Whether, at the outset of the evidentiary hearing, the Administrative Law Judge erred in ordering, *inter alia*, that counsel for L & M refrain from consulting with L & M's part owner, Winfred L. Lanningham, with respect to a relevant incident that allegedly occurred at an establishment known as the Driftwood Inn.

B. Whether the Administrative Law Judge prejudicially interfered with the examination of Parks as well as other witnesses.

### *Discussion*

#### A.

[1] On appeal, L & M attacks an order issued from the bench as a preliminary matter at the outset of the evidentiary hearing. After granting L & M's motion to exclude from the hearing room witnesses other than Parks and Winfred L. Lanningham, and acting without a motion by either party, the Administrative Law Judge said (Tr. 2) :

Let the record also show that I have ordered that Mr. Parks and Mr. Lanningham are to be deemed as sequestered by the Court with respect to the incident that allegedly occurred at the Driftwood Inn, which means that neither counsel is to consult the deeds of the prospective witnesses with respect to this incident while they are off the witness stand.

Immediately after this statement, the record shows that the following colloquy between counsel for L & M and the Judge ensued (Tr. 2-3) :

\* \* \* \* \*

MR. LOHMAN: If it pleases the Court, Your Honor, while we are on the record, I would like to interpose my exceptions to that ruling at this time to get it into the record.

JUDGE KENNEDY: All right. And what's the basis for your exceptions?

MR. LOHMAN: Well, primarily, I feel that I should be allowed to counsel with my client at anytime throughout the proceeding.

JUDGE KENNEDY: All right. That objection is overruled, and the order of sequestration will apply to these two witnesses with respect to that incident until it is lifted.

You have, I understand, Mr. Lohman, had full opportunity to consult with Mr. Lanningham about this incident up to this time, have you not?

MR. LOHMAN: Yes, sir.

JUDGE KENNEDY: And you understand Mr. Lanningham is going to be called as a witness by the Applicant?

MR. LOHMAN: Yes, Your Honor, I do.

\* \* \* \* \*

Counsel for L & M contends that the Judge had no authority to prevent him from talking to one of the owners of L & M, the man who was in reality his client. He insists that his objection to that order was improperly overruled and that the failure of the Judge to allow him to speak to Lanningham with respect to the so-called Driftwood Inn incident prejudiced his ability to cross-examine Parks.

Contrarily, Parks contends that the Judge's order merely required counsel and the witnesses covered by the order to " \* \* \* speak only in the presence of the court, and on the record, about the Driftwood incident after the trial commenced. \* \* \*" Supplemental Brief of Parks, p. 2. He further contends that the so-called order of sequestration, attacked by L & M, may be overturned at the appellate level only upon a showing of a clear abuse of discretion and prejudice, a showing he argues was not made.

Starting with Parks' assertion as to the content of the order now under scrutiny, we do not agree that it had the limited effect suggested by him in his supplemental brief. As we read the Judge's order, it precluded counsel for L & M from discussing the so-called Driftwood Inn incident with Lanningham at any time, anywhere, until it was lifted.

However, we hasten to add that regardless of whether our reading of the instant order or Parks' reading is the correct one, it still was erroneous. As all the cases cited to us by Parks show, the term "sequestration," as it pertains to witnesses, involves their exclusion from the hearing room so that a later witness is precluded from shaping his testimony in light of that given by an earlier witness in his presence. See 6 Wigmore, Evidence §§ 1837-1840 (3d Ed. 1940). When the above-quoted portion of the transcript is viewed with that definition in mind, it is plain that the order in question was not an order of sequestration at all because the content plainly did not involve exclusion of witnesses from the hearing room so that they would be unable to hear one another. The order generally prevented communication between both attorneys and their respective clients with respect to an incident in controversy.

In issuing his extraordinary order *sua sponte* and in overruling L & M's objection to it, the Administrative Law Judge did not state his underlying rationale. But by invoking the concept of "sequestration," he must have been fearing some sort of collusion directly involving one or both the attorneys which would subvert the fact-finding process. On the basis of what the case file reveals and of our own observations of both counsel, we think that the Judge too lightly assumed an unethical mischief-making potential on the part of the

attorneys. And in any event, there is no precedent, so far as we are aware, which would lend any support to an order by an administrative or judicial tribunal precluding an attorney *generally* from talking to any willing witness, let alone a witness who happens to be his own client.<sup>10</sup>

As to L & M's contention that the error in issuing this order was prejudicial in the circumstances, we have only L & M's conclusory assertion to that effect. Counsel for L & M submits that the so-called order of sequestration impeded his cross-examination of Parks on the so-called Driftwood Inn incident because he was precluded from consulting with Winfred Lanningham who was likewise present at that incident. Counsel has made no showing in support of his submission, and having read the record ourselves, we cannot say that there was palpable prejudice sufficient to cause reversal or remand. Having so concluded, we nevertheless reiterate that the order was error.

### B.

[2] We turn now to the remaining issue on appeal which raises disturbing questions regarding the Administrative Law Judge's conduct of this proceeding during the evidentiary hearing. L & M argues

<sup>10</sup> We are not suggesting that an Administrative Law Judge cannot admonish an attorney who disrupts the orderly progress of hearing by conferring loudly with a client or cannot deny motions for a recess that are without merit.

that it was prejudiced by frequent and allegedly unjustifiable questioning from the bench during the examination of witnesses. In particular, L & M cites a series of questions asked by the Judge in the middle of its cross-examination of Parks. Just prior to those questions, counsel was attacking Parks' credibility by confronting him with alleged discrepancies between his testimony on direct examination and his testimony in the prior arbitration hearing. The questioning was focused on Parks' responses to queries in both hearings regarding the excuse or excuses he claimed to have given to L & M for not reporting to work during the entire week of May 5, 1975, the week Parks called for and obtained a MESA inspection and the week which ended with his suspension pending discharge. That questioning, with counsel for L & M, Eugene Lohman, asking the questions and with Parks responding, went as follows (Tr. 156-157):

\* \* \* \* \*

Q. And you didn't go back to work on Monday, May the 5th?

A. No, sir, I didn't.

Q. And this \* \* \* you missed the entire week, May 5th through the 9th?

A. I called May the 5th \* \* \* early May the 5th and told them I would not be in.

Q. And this is when you talked to Mr. Ridings?

A. Yes, it is.<sup>11</sup>

Q. And did you tell Mr. Ridings that you weren't coming in because you were ill?

<sup>11</sup> As we noted in our statement of the factual background to this proceeding, Ridings is an endloader operator and a fellow miner.

A. I told him that I \* \* \* if they were \* \* \* when they got in compliance with the roof control plan that I would \* \* \* for them to get in touch with me, and I would be to work.

Q. Didn't you state previously at the arbitration hearing that the reason that you didn't \* \* \* weren't coming in to work on Monday, May the 5th, was because you were ill, was \* \* \*

A. I was sick, but I was going to \* \* \*.

Q. Well, what was the nature of your illness?

A. Well, I have sinus trouble, and I have \* \* \* sometimes I have to see a doctor about it, and I had some sinus problems then.

At this point, counsel for Parks interjected:

MR. TRUMKA: Excuse me. What date are you speaking of now?

MR. LOHMAN: May the 5th.

MR. TRUMKA: May the \* \* \* this would be Monday, Jack. If you don't understand the date, tell him to tell you \* \* \* to explain to you.

MR. LOHMAN: Your Honor, I would object to counsel confer \* \* \*.

That interrupted objection in the transcript is then followed by the exchange to which L & M has strenuously objected on appeal. That exchange, commencing with a response to counsel's barely made objection and continuing with the Administrative Law Judge's questioning of Parks, was recorded as follows (Tr. 157-159):

JUDGE KENNEDY: I think he understood the date. I think you probably missed it. He was talking about May 5th. You've testified here today, though, several times the reason you didn't go to work on May 5th is you were afraid?

THE WITNESS: Yes, sir, that's true.

JUDGE KENNEDY: You were afraid of being killed; is that it?

THE WITNESS: That's right.

JUDGE KENNEDY: And even though you are a safety committeeman and you were familiar with all your rights under the contract, you didn't choose to go down and then walk out because it was an imminent danger of anything in the section; is that right?

THE WITNESS: That's true. Of course, I had to decide, you know, make a decision myself, but there is a possibility other men would have been involved in that, and if I had walked out maybe they would not have. And I've considered a number of things that brought about my decision not to work on Monday.

JUDGE KENNEDY: Would you like to tell us what those things were?

THE WITNESS: Well, just as I mentioned then and, of course, then one of the things that was paramount in my mind was that he had refused, flatly refused, to obey the roof control plan, and I have no reason to think that he would obey an imminent danger if we became an imminent danger in the mines after that either.

JUDGE KENNEDY: You knew you could close the mine for imminent danger—your safety committee—you knew that too; didn't you?

THE WITNESS: Well, I never did it, sir, but I did \* \* \* I was aware that an imminent danger could be declared.

JUDGE KENNEDY: You weren't?

THE WITNESS: I was aware of the fact, but I don't know that mine \* \* \* I didn't figure that mine management would recognize it. We asked them if they were going to recognize the bolt plan and they \* \* \* after two boys getting killed, they said they were not, so I was just afraid to go in. I mean, that's in essence what the reason \* \* \*.

JUDGE KENNEDY: Not because you were sick, or you may have been sick but it was \* \* \*.

THE WITNESS: I've \* \* \*.

JUDGE KENNEDY: \* \* \* it was fear. That may be an illness, too, I guess, in a way, but it's not \* \* \* it wasn't an organic illness such as Mr. \* \* \*. I guess, Mr. Lohman was referring to.

THE WITNESS: That's right.

JUDGE KENNEDY: You may proceed, Mr. Lohman.

\* \* \*

L & M contends that these questions were beyond the scope of a trial judge's discretion to interrogate a witness. L & M further asserts that these questions were prejudicial because they were leading and suggestive and planted thoughts in Park's mind in a manner which improperly assisted the witness and effectively deprived L & M of its right to cross-examine. As a demonstration of the allegedly prejudicial impact of the Administrative Law Judge's questioning, L & M points to the exchange between its counsel and Parks immediately following the cessation of interrogation from the bench which went as follows:

BY MR. LOHMAN:

Q. So you did make a statement that you were ill, and that's the reason that you weren't coming in in addition to these other reasons that you talked about?

A. [No response.]

Q. When you talked to Mr. Ridings, didn't you tell him that you were ill and that was one of the reasons that you weren't coming in to work that day?

A. I don't remember saying anything about being ill to Mr. Ridings, no.

Q. Didn't you also state at the arbitration hearing that one of the reasons that you weren't coming in was because you had some union work to do for some of the other employees?

A. All I said to Mr. Ridings was that \* \* \* just as I stated \* \* \*

Q. I'm not asking \* \* \*.

A. \* \* \* a minute ago.

Q. I'm not asking what you told Mr. Ridings; I'm stating that at the arbitration proceeding earlier, didn't you state that you had other work to do for some of the other employees and that was one of the reasons that you didn't come in during that week?

A. I met with the men a number of times since they withdrew there if that's what you \* \* \*

Q. Did you make \* \* \*

A. \* \* \* that's what you mean?

Q. \* \* \* that statement at the arbitration hearing?

A. I may have.

Q. Don't you recall what was stated at the arbitration hearing?

A. I don't recall word for word, no, sir.

Q. So you're maintaining that the only reason that you didn't come in was because you were afraid?

A. That's the main reason, yes.

\* \* \*

In defending the Administrative Law Judge's questioning, counsel for Parks argues that his queries were fair and impartial and that he acted in an entirely proper way to enhance his understanding of the case and to build a complete record. We are further informed that the proof of the Judge's impartiality lies in instances where there was " \* \* \* evidence introduced into the record by the questioning of Judge Kennedy \* \* \*," evidence which was favorable to L & M Brief of Parks, p. 41. Parks contends that L & M's assignment of error " \* \* \* is nothing more than [an] invitation to the Board to erect barriers which seriously

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[would] affect an Administrative Law Judge's ability to ascertain the truth. \* \* \* Brief of Parks, pp. 41-42.<sup>12</sup>

In our opinion, the standard by which the above-quoted controversial questioning at the administrative hearing in this case must be judged is the same as that which governs questioning from the bench in a judicial hearing because the evils sought to be avoided are the same.<sup>13</sup> That standard and the basic supporting rationale for it are best summed up in Canon 15 of the *Canons of Judicial Ethics* which is captioned—"Interference in Conduct

of Trial"—and reads in pertinent part as follows:

A judge may properly intervene in a trial of a case to promote expedition, and prevent unnecessary waste of time, or to clear up some obscurity, but he should bear in mind that his undue interference, impatience, or participation in the examining of witnesses, or a severe attitude on his part toward witnesses, especially those who are excited or terrified by the unusual circumstances of a trial, may tend to prevent the proper presentation of the cause, or the ascertainment of the truth in respect thereto.<sup>14</sup>

\* \* \* \* \*

Applying that standard to this case, the first observation to be made is that the Judge's questions served no valid or useful purpose.

<sup>12</sup> Parks points out that counsel for L & M interposed no objection to the Judge's questioning at the time the questions were asked. Based on that omission, Parks would have us hold that L & M waived any objection it now raises on appeal.

We have in the past held that the failure to make timely objection below to a statement, question, or action by an opposing attorney constitutes a waiver of such objection on appeal. See *Zeigler Coal Company*, 3 IBMA 448, 456-458, 81 I.D. 729, 1974-1975 OSHD par. 19,131 (1974), *aff'd on reconsideration*, 4 IBMA 139, 82 I.D. 221, 1974-1975 OSHD par. 19,638 (1975), *rev'd on other grounds, sub nom Int'l Union, United Mine Workers of America v. Kleppe*, 532 F.2d 1403 (D.C. Cir.), *cert. denied, sub nom Bituminous Coal Operators' Assn., Inc. v. Kleppe*, \_\_\_\_\_ U.S. \_\_\_\_\_ (1976). *Old Ben Coal Company*, 6 IBMA 294, 83 I.D. 335, 1976-1977 OSHD par. 21,094 (1976). We are not willing to extend those cases to a situation where the Judge originates the objectionable action. Unlike this situation, those cases involved an inexcusable lack of diligence. Here, we are appreciative of the reluctance of counsel to treat the Judge as if he were an adversary, and we refuse to penalize him for his self-control and showing of respect in trying circumstances.

<sup>13</sup> A proceeding under section 110(b) of the Act is strictly an adversarial, private controversy. Granting that there is an indirect public stake in the outcome, this kind of a case is still neither a legislative investigation nor an inquisition.

<sup>14</sup> American Bar Assn., *Code of Professional Responsibility and Canons of Judicial Ethics* (1970), p. 46.

Another, slightly differing statement of the standard appears in chapter VI, B 4(f) of the *Manual for Administrative Law Judges* which was prepared under the auspices of the Administrative Conference of the United States. That subsection reads as follows:

"QUESTIONS BY THE JUDGE—The Judge may question the witness initially if it is likely to forestall extensive examination by others. He should interrupt when the witness and counsel are at cross purposes, when the record may not reflect with clarity what the witness intends to convey, or when for some other reason assistance is needed to assure orderly development of the subject matter. At the close of cross or redirect, the Judge may question the witness to clarify any confusing or ambiguous testimony or to develop additional facts." Ruhlén, *Manual for Administrative Law Judges* (1974), p. 35.

It is also worth pointing out that at the 1975 Annual Banquet of the Federal Administrative Law Judges' Conferences, the following was offered as a part of the "Administrative Law Judge's Creed":

"Remember always that the rights of trial counsel's clients are the most important concern at hand, that counsel are the best protectors of those rights and that so far as possible the conduct of the case should be left to counsel. Allow room for creative lawyering."

Far from promoting expedition, preventing unnecessary waste of time, or clearing up some obscurity, these questions impeded a barely begun cross-examination on an entirely clear subject, namely, alleged inconsistencies in sworn testimony, a subject which was and is of the essence in this case because much of Parks' claim and of L & M's defense thereto are vitally related to the credibility of the former's largely uncorroborated word on key points.<sup>15</sup>

The second and more important observation to be made is that the Administrative Law Judge's questions were not idle and innocent inquiries. Rather, they were actively subversive of the truth-seeking process both in form and content, given what he knew just prior to

his interruption of L & M's cross-examination of Parks.

With the arbitration decision in hand as L & M's answer to Parks' application for review, the Administrative Law Judge knew perfectly well that Parks' credibility had been impugned by an indisputably neutral trier of fact. He was aware that the arbitrator had underscored what he thought was Parks' inability to testify consistently and persuasively as to what he said and did during the week of May 5. More particularly, the arbitrator cited the following shifts in Parks' testimony at p. 13 of his decision:

\* \* \* \* \*

Under the evidence furnished by the Grievant, himself, he stated first, that he did not report to work at the mine on Monday because he was sick. He then amended this statement and stated that he was not sick enough to be away from work. *That he intended to work, but he had received reports from other employees, by telephone, that it was dangerous to work because of the roof conditions. That he decided not to report for work on Monday because of the dangerous condition of the roof.* That he decided he would not report to work until this condition was corrected. Finally, he amended this statement and said that he had Union business, during the entire week, that kept him so busy that he did not report for work.<sup>16</sup>

\* \* \* \* \*

<sup>15</sup> The italicized portion of this quotation was on the copy in the case file and was probably the work of Judge Kennedy or someone working under his supervision. See n. 2, *supra*.

The certified copy of the arbitration transcript at AT 120 contains the following statement by Parks:

"The only conversation that I remember on May 5th was calling Odie Ridings and that was prior to the work shift and I was up

<sup>15</sup> The controversy over what was said and done at the Driftwood Inn is but one such point, albeit the most prominent.

Another is Parks' account of his actions following the inspection which took place on May 6, 1975, an account which, if untrue, would raise doubts as to the genuineness of his professed belief that he was discharged for the exercise of protected rights under the Act rather than for inexcusable neglect of his work responsibility. In this connection, it is worth highlighting once again a conflict in the record which in our opinion was not disposed of satisfactorily in the opinion below. That conflict concerns Parks' assertion that he looked at the mine bulletin board on Wednesday, May 7, the day after the inspection he requested, and saw nothing pertinent to that inspection. His assertion is apparently in conflict with testimony of Robert Lanningham, the mine superintendent, which was believed by the Judge. See n. 4, *supra*.

Then, too, there is Parks' account of the alleged meeting with management on May 5, 1975, at which time he claims to have informed management directly that he was going to contact MESA and ask for an inspection. There is no detailed corroboration for that statement and L & M denied that there ever was such a statement.

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In addition to the arbitrator's decision, the Administrative Law Judge had heard Parks testify on direct examination and he knew that Parks had not only failed to refer to any illness, but that he recalled the telephone message he gave Odie Ridings on the morning of May 5 for transmission to L & M as an excuse for not reporting to work as follows (Tr. 145) :

I told him that I would not be in that day and that I would come in when they got in compliance with the roof control [plan] that the Interior Department had issued them.

*Compare* AT 120 quoted at n. 13, *supra*.

Finally and to underscore what has previously been quoted, the Judge had just heard prior to his interruption the following exchange between counsel for L & M and Parks:

\* \* \* \* \*

Q. And did you tell Mr. Ridings that you weren't coming in because you were ill?

A. I told him that I \* \* \* if they were \* \* \* when they got in compliance with the roof control plan that I would \* \* \* for them to get in touch with me, and I would be to work.

Q. Didn't you state previously at the arbitration hearing that the reason that you didn't \* \* \* weren't coming in to

early and I had intentions of going to work but like I told him I was sick and it was before 7:00 and Odie Ridings will verify that I did talk to him on the phone."

Later, at AT 130, Parks admits that he had no doctor's certificate to prove illness, and on the next page, AT 131, referring to proof of illness he stated: "I can, I think, have it substantiated by Doctor Taylor that \* \* \* I'm still in the process of recovery."

work on Monday, May the 5th, was because you were ill, was \* \* \*

A. I was sick, but I was going to \* \* \*

Q. Well, what was the nature of your illness?

A. Well, I have sinus trouble, and I have \* \* \* sometimes I have to see a doctor about it, and I had some sinus problems then.

[Tr. 156-157.]

\* \* \* \* \*

These questions, which constituted the beginning of cross-examination on the subject of Parks' alleged discrepancies in sworn testimony, as well as the character and content of the responses given, should have alerted the Judge to the factual issue being explored which plainly, unmistakably, and in a word was *credibility*.

Given what he knew and had just heard, the Administrative Law Judge should have allowed L & M the latitude to pursue its line of questioning and he should have listened to and observed Parks as cross-examination progressed. He had no reason to ask *any* questions at the point at which he intervened. He certainly had no warrant whatsoever to ask the particular questions now under review at any time. In light of the last two questions of counsel for L & M and the responses thereto, just quoted above, questions such as:

You've testified here today though, several times the reason you didn't go to work on May 5th is you were afraid?

followed by:

You were afraid of being killed, is that it?

and then by:

And even though you are a safety committeeman and you were familiar with all your rights under the contract, you didn't choose to go down and then walk out because it was an imminent danger or anything in the section; is that right?

[Tr. 157-158.]

can only be described as grossly leading and suggestive rehabilitation. These were questions which would have been objectionable had they been asked on redirect by Parks' counsel. And going still further, a "question" such as:

\* \* \* it was fear. That may be an illness, too, I guess, in a way, but it's not \* \* \* it wasn't an organic illness such as Mr. \* \* \* I guess, Mr. Lohman was referring to.

followed by the response:

That's right.

[Tr. 159.]

is not a question at all; it's essentially testimony by the Judge put in the mouth of the witness.

An Administrative Law Judge, as an experienced trier of fact, should be well aware of the vice of asking grossly leading questions. Indeed one of the ironies of this record is the Judge's criticism of counsel for asking that type of question (Tr. 131). Apparently, he was unable to discern the worthlessness of such questions when he was the interrogator, an inability which highlights the validity of the time-honored constraints upon extensive questioning of witnesses from the bench.

Counsel for Parks suggests that if the controversial questions were error, they constituted harmless er-

ror. We cannot agree because the subsequent questioning of Parks and the Judge's decision have vividly demonstrated to us the harm done by his questions.

It should be recalled that, just prior to the Judge's interrogation, Parks had responded to questions regarding his testifying to illness at the arbitration hearing with the answer that he had been sick with sinus problems (Tr. 157). With the prompting implicit in the Judge's questions and having had a Judge-made respite from cross-examination, Parks had an entirely different response to L & M's questions regarding his testimony at the arbitration proceeding. After the Administrative Law Judge completed his questioning, Parks developed memory lapses. He could not remember telling Odie Ridings that he was ill. Neither could he recall what he had said at the arbitration proceeding. But there was one point to which he could testify positively; namely, that the "main reason" for his refusal to work was fear (Tr. 159-160).

Not having had the opportunity to observe Parks on the stand, we of course have no way of knowing whether the perceptible shift in his testimony following the Judge's interrogation shows an innocent man reacting to suggestion from an authoritative figure on the bench indicating the responses that he wanted to hear, or if his testimony reveals a cunning individual capitalizing or attempting to capitalize upon friendly questions. The Administrative Law Judge's interfer-

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ing inquiries thus have precluded any determination as to whether Parks was believable.

Going beyond the prejudice manifested in the transcript, the Judge's decision in this case also reflects the impact of his questioning. Anyone reading that decision, which runs on for 49 single-spaced pages, would never suspect that there was this or other alleged conflicts between Parks' testimony in this case and the testimony he gave before the arbitrator. The Administrative Law Judge never discussed in detail the aspersions cast by the arbitrator on Parks' credibility when describing the latter's findings and conclusions (Dec. 2-3). He merely alluded to them at p. 29 and relied on the worthless evidence produced by his suggestive questions now under scrutiny; he wrote as follows:

\*\*\* early on the morning of Monday, May 5, 1975, applicant called the mine office and told Odi Ridings, an endloader operator, to tell the Lanningshams he was afraid and was not coming to work until they would agree to comply with the requirements for supporting the roof with roof bolts as set forth in the new roof control plan (Tr. 145, 148-149, 156-159, 182, 348, 394).

While applicant *may* also have given other excuses for his refusal to work such as a flareup of a sinus condition or his preoccupation with Union business.<sup>23</sup>

<sup>23</sup> See Umpire's Decision at 12, and Tr. 157. [Italics added.] <sup>27</sup>

a preponderance of the probative and credible evidence establishes that the ap-

<sup>27</sup> In most cases of alleged discriminatory discharge, if not all, credibility is a major issue. Moreover, in many of these instances, the aggrieved miner has a cause of action in

applicant repeatedly told management on Monday and Tuesday, May 5 and 6, 1975, he was afraid of the top and would not work on the 001 section of the No. 2 Mine because of the hazardous roof conditions which he believed existed and management's refusal to comply with the approved roof control plan (AX-11; Tr. 145-146, 156-160, 182, 348). [Italics added.]

Based on the foregoing and given the critical nature of the issue of Parks' credibility, we hold that the interference from the bench in L & M's cross-examination of Parks was prejudicial error. And inasmuch as that error goes to credibility, a remand is a necessity.<sup>28</sup> L & M

three forums before three different adjudicators: an arbitrator, the Secretary, and the NLRB, although not necessarily in that order.

There is a risk that a miner, whose claims are not meritorious, will go from forum to forum benefiting from every adjudicative critique of his performance and tailoring his tale after each, the better to persuade a succeeding trier of fact if he failed to convince the prior one of his credibility. Where there has been a previous adjudication of the facts of a discharge which is the subject of a sec. 110(b) claim for relief, and where credibility is an issue and a reliable copy of the record of the previous proceeding or proceedings has been filed here, an Administrative Law Judge has an obligation to deal *explicitly* with alleged discrepancies in testimony. While we are mindful that hearings under sec. 110(b) are de novo and that an Administrative Law Judge may discount discrepancies in testimony, he must treat them and the failure to do so is error which may be prejudicial.

<sup>28</sup> In his brief at n. 23, p. 40, Parks relies on the Board's decision in *Old Ben Coal Company*, 4 IBMA 224, 82 I.D. 277, 1974-1975 OSHD par. 19,722 (1975). He points out that despite a finding of improper interference from the bench with witnesses, the Board did not remand in that instance.

Parks' reliance on *Old Ben* is misplaced because at oral argument in that case counsel for Old Ben agreed that the Board could make a fair decision on de novo review. By so agreeing, counsel had in effect conceded the harmless nature of the Judge's error. There is no such concession here.

has asked that we remand to an Administrative Law Judge other than Judge Kennedy because of assistance given Parks in proving his claim. Parks has not reacted to that particular appellate request, preferring instead to object to remand generally.

If the error discussed in such detail above had been an isolated deprivation of due process, we would unhesitatingly and summarily deny L & M's request for a new Judge. However, the error was not so isolated. Rather, it was a typical reflection of the assistance given to Parks in particular and of the havoc wreaked upon the evidentiary presentations of *both* attorneys by impatient interference from the bench. The Administrative Law Judge seemed wholly unable to refrain from trying each attorney's case for him, and at the risk of unduly lengthening an already lengthy opinion, we feel compelled to cite examples of how thoroughly he adopted the mantle of an advocate throughout the hearing and transformed an adversarial proceeding into semi-inquisition.

As his first witness, Parks, acting by his counsel, Mr. Trumka, called Winfred Lanningham apparently as an adverse witness for questioning as if he were under cross-examination. At Tr. 76-77, after 14 pages of almost uninterrupted and wide-ranging cross-examination by the Administrative Law Judge, *the Judge* laid the foundation for one of Parks' exhibits and without so

much as a motion received that exhibit as follows:

\* \* \* \* \*

JUDGE KENNEDY: All right. Then you wrote this next document AX-12 which is your \* \* \* it's entitled, "Decision at the Expiration of the Five-Day Waiting Period." You're familiar with that document?

THE WITNESS: Yes, I've seen \* \* \*

JUDGE KENNEDY: Would you show him that document, Mr. Trumka?

MR. TRUMKA: Yes, I will.

THE WITNESS: I've seen the document, sir. I mean \* \* \*

MR. TRUMKA: Would you like to mark this, Your Honor?

JUDGE KENNEDY: That should be marked as AX-12. You have a copy, Mr. Lohman, I think.

MR. LOHMAN: Yes, sir.

JUDGE KENNEDY: Is that your signature, Mr. Lanningham?

THE WITNESS: Yes, sir. Yes, it is.

JUDGE KENNEDY: And you issued that when? On May 19, 1975?

THE WITNESS: May 19th is the date on it. I \* \* \* but I didn't personally give this to him myself, sir.

JUDGE KENNEDY: I take it there's no objection to receipt this document, Mr. Lohman?

MR. LOHMAN: No, sir.

JUDGE KENNEDY: Let the record show then that without objection AX-12 is received.

\* \* \* \* \*

At Tr. 126, counsel for L & M objected to a line of questioning by Parks related to a particular document on the ground that such document had not been introduced. Rather than ruling on the objection, the Judge treated it as if it were an objection to an alleged lack of proper foundation and proceeded; as he had in the instance just discussed, to

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lay the foundation himself (Tr. 126-127) rather than allowing or requiring Parks' attorney to do so himself. Again acting without a motion, he received the document in question into the record (Tr. 128). Proceeding as he did in this instance and performing elementary trial functions which are exclusively the preserve of the advocate, the Judge put himself in the conflicting position of adjudging the adequacy of the foundation for an exhibit that he had himself laid.

Throughout the transcript, the Administrative Law Judge examined and cross-examined witnesses unnecessarily and harshly, and to an extent which can only be described as pervasive.

To pick just one example of an instance of his taking over of cross-examination which damaged Parks, we cite the following excerpt from the transcript concerning Parks' alleged efforts to determine the results of the May 6 inspection, evidence relevant to his credibility (Tr. 176-183).

\* \* \* \* \*

By Mr. Lohman [counsel for L & M]:

Q. So that you didn't really make any efforts at all to find out whether the mine was in a safe condition, did you?

A. Well, that was the inspector's \* \* \*

Q. I beg your pardon; I can't hear you.

A. I felt that was the inspector's job.

Q. Well, don't you feel that you should know whether or not the mine is safe before you go down into it?

A. They \* \* \* I figured they would let me know when they made an inspection.

Q. In their own time?

A. Pardon?

Q. In their \* \* \* weren't you interested in finding out yourself so you could get back to work?

A. I was. That's why I called the MESA office a number of times.

Q. How many times did you call?

A. I'd say four, or four or five times at least.

Q. And when you did call, on \* \* \* did you call on Monday or Tuesday?

A. I called Ronnie Franks on Monday.

Q. Now that's when you advised him to go ahead and make the inspection?

A. I asked him to.

Q. Did you call on Tuesday?

A. I called the MESA office on Tuesday, but I didn't get any \* \* \*

Q. Was there a busy signal or what?

A. No, I talked to the lady in the office.

Q. Did you ask her what the results of the inspection were?

A. No.

Q. Then when \* \* \* who else did you talk to at MESA?

A. MESA \* \* \* the girls in the front office; I didn't get to talk to any \* \* \*

Q. Just the girls in the front office? Did you make any other attempts to find out what the condition of the mine was?

A. I went to the mine a time or two during the week.

Q. What \* \* \* OK, when did you go to the mine?

A. I believe it was on Wednesday. I talked to Homer Lanningham, which is W. L.'s brother.

Q. And did he not tell you that the inspectors had not found that they were not complying with the roof control plan, or did you ask him?

A. I just asked him if his work \* \* \* if they had said anything about me coming back to work in favorable \* \* \* no, I didn't ask him about the plan \* \* \* the \* \* \*

Q. You didn't ask him anything about that; well \* \* \*

JUDGE KENNEDY: What did you do, lose interest in this whole thing after you called MESA?

THE WITNESS: No, sir.

JUDGE KENNEDY: You knew the mine hadn't been closed on Tuesday; right?

THE WITNESS: Had to be closed?

JUDGE KENNEDY: Had not been closed, right?

THE WITNESS: Well, I \* \* \* when I called the inspectors, I just left it with them. I figured that was their \* \* \* that's their department.

JUDGE KENNEDY: When did you find out the results of the inspection?

THE WITNESS: We went back and talked to Mr. Lanningham on Friday.

JUDGE KENNEDY: So between \* \* \* is it your testimony that between what, Monday and Friday, you didn't know what had happened as a result of your call to Mr. Franks?

THE WITNESS: No, he \* \* \*

JUDGE KENNEDY: Well, answer my question, yes or no?

THE WITNESS: I didn't know, no.

JUDGE KENNEDY: Between Monday and Friday you didn't know?

THE WITNESS: No, sir, I tried to find out at the office at Norton, but I was unable to.

JUDGE KENNEDY: Why were you unable?

THE WITNESS: I just was unable to get in touch with any of the inspectors.

JUDGE KENNEDY: Why couldn't you reach him in \* \* \* did you call Mr. Compton?

THE WITNESS: No.

JUDGE KENNEDY: Why didn't you call Mr. Compton? Isn't he the district manager?

THE WITNESS: I wouldn't want Mr. Compton \* \* \* no, I didn't call him.

JUDGE KENNEDY: You didn't think it was important enough; right?

THE WITNESS: Well, it was important; I was \* \* \*

JUDGE KENNEDY: Well, isn't he the top man?

THE WITNESS: I don't know who. Mr. Franks was in charge of the office when I talked to him, temporarily in charge.

JUDGE KENNEDY: Did you call Mr. Franks?

THE WITNESS: I talked to him on Monday and \* \* \*

JUDGE KENNEDY: Did you call him on Tuesday, Wednesday, Thursday or Friday?

THE WITNESS: No.

JUDGE KENNEDY: Are you sure you called the MESA office on Tuesday?

THE WITNESS: Yes, sir.

JUDGE KENNEDY: Who did you call?

THE WITNESS: I \* \* \*

JUDGE KENNEDY: You said you didn't call Mr. Franks and you didn't call Mr. Compton; who did you call?

The WITNESS: I'm not sure of the \* \* \* if I asked for any particular person, but I called the office, and \* \* \* on two or three different occasions that week.

JUDGE KENNEDY: But you didn't \* \* \* after Tuesday you just gave up calling at all; is that right?

THE WITNESS: Well, they \* \* \* usually they'll send a safety \* \* \*

JUDGE KENNEDY: Well, what's \* \* \* I'm just asking you, after Tuesday, what efforts did you make to find out the results of the inspection?

THE WITNESS: Well, I went to the mine on Friday.

JUDGE KENNEDY: You did what?

THE WITNESS: I went to the mine on Friday.

JUDGE KENNEDY: On Friday, but on Wednesday and Thursday you didn't do anything; is that right?

THE WITNESS: Well, no.

JUDGE KENNEDY: Did you talk to Mr. Gilbert, the safety director of District 28?

THE WITNESS: I was in constant touch with Mr. Gilbert.

JUDGE KENNEDY: And he couldn't find out what the results of the inspection were either?

THE WITNESS: Well, I'll \* \* \* they're supposed to send me a copy of the report when they make them \* \* \* the inspectors are. My name and my address

are on the reports, and they're suppose to send me a copy at my home.

JUDGE KENNEDY: Who's supposed to send you a copy?

THE WITNESS: The inspectors.

JUDGE KENNEDY: Is that what you were waiting for?

THE WITNESS: Well, I \* \* \* that's the usual procedure.

JUDGE KENNEDY: Was it your position that you had a right to refuse to work until you heard from MESA?

THE WITNESS: Pardon?

JUDGE KENNEDY: Was it your position that you had a right to refuse to work until you heard from MESA?

THE WITNESS: Well, I was \* \* \* yes, you might say that.

JUDGE KENNEDY: When did you hear from MESA?

THE WITNESS: Well, we talked to Mr. Lanningham on the ninth, and that's when he discharged me.

JUDGE KENNEDY: Showed you what?

THE WITNESS: That's when he discharged me.

JUDGE KENNEDY: He discharged you?

THE WITNESS: Yes, sir.

JUDGE KENNEDY: You didn't answer my question, sir.

THE WITNESS: Pardon?

JUDGE KENNEDY: You didn't answer my question.

THE WITNESS: I'm sorry.

JUDGE KENNEDY: I said, when did you hear from MESA?

THE WITNESS: I'm not sure who sent \* \* \* if they sent me a notice of the inspection or not, but they're supposed to.

JUDGE KENNEDY: Well, now, you understand that the operator here says that you were discharged for refusing to work the week of May 5th; is that right? You understand that?

THE WITNESS: Yes, sir.

JUDGE KENNEDY: And as I understand your testimony is that you did refuse to work the week of May 5th; right?

THE WITNESS: I called in and told them, yes, early that morning that \* \* \*

JUDGE KENNEDY: That you weren't going to work; is that right?

THE WITNESS: I said I would be to work when they got in compliance with the roof control plan that they were issued. I was afraid to go to work.

JUDGE KENNEDY: And you know the record here shows that on Tuesday, May 7th, MESA said that they were in compliance with the roof control plan; right?

THE WITNESS: [No response.]

JUDGE KENNEDY: Yes, Tuesday, May 6th, excuse me. That's what the record shows, right?

THE WITNESS: I suppose it is.

JUDGE KENNEDY: And you don't dispute that, do you?

THE WITNESS: No, if that's what the record shows.

JUDGE KENNEDY: So, there \* \* \* what was the justification for your refusal to work after May 6th?

THE WITNESS: Well, they laid the other boys off, and I was afraid to \* \* \* I was just afraid to work until they \* \* \* the management come to grips with the problem of roof bolting. I mean, I had \* \* \* I had my wife and family to think about, too, as well as myself.

JUDGE KENNEDY: Well, let me ask you this, sir, was it your position that no matter what MESA said, you weren't going to go to work in that mine until Mr. Lanningham told you he was going to comply?

THE WITNESS: Well, he said he was not going to comply and \* \* \*

JUDGE KENNEDY: Well, I'm asking you what would it have taken on Mr. Lanningham's part to induce you to go back to work?

THE WITNESS: If he had told me that he was going to comply with the roof control plan on Friday or called me at home or sent me a letter of whatever, then I would have been glad to go back to work.

JUDGE KENNEDY: Well, you see, I keep getting different versions of why

you refused to work: first, you said you refused to work because you wouldn't do it until MESA said the operator was in compliance with the roof control plan; then MESA said he was in compliance with the roof control plan, but you still refused to go to work, and you say, yes, the reason you did that was because you didn't care what MESA said, you weren't going to go to work until Mr. Lanningham told you he was in compliance.

\* \* \* \* \*

At the point of Judge Kennedy's interjection, counsel for L & M was competently in the process of impeaching the testimony of the witness and needed no assistance from the bench. Moreover, had the Judge held for L & M and had he made credibility findings adverse to Parks on the basis of the interrogation just quoted, we have little doubt that Parks would have appealed, citing these very same pages as evidence of error, and, in such event, might well have been entitled to remand.<sup>19</sup>

Far more serious than the interference in the cross-examination of Parks and certainly far more prejudicial in light of the outcome was the Judge's interference in the examination and cross-examination of L & M's key witnesses. For instance, the direct examination of Winfred Lanningham spans 42 pages. Of those 42 pages, approximately 6 out of every 7 pages represented interrogation from the bench; counsel for L & M was barely able to inter-

ject a question edgewise. Although the Judge did permit Mr. Trumka to cross-examine without interruption, he had still more questions afterward. The character of some of those questions is apparent in the following at Tr. 351:

\* \* \* You've heard Mr. Parks testify about what he called a certain amount of harassment that he felt he received in 1974 with these comments that were being made to him about we're going to get rid of you or you're responsible for all these safety inspections. Is it the policy of your company to put the heat on the safety committeemen, so to speak?

Robert Lanningham was another witness questioned extensively by the Administrative Law Judge throughout his direct testimony (Tr. 366-384). Barely a page of the transcript goes by without reflecting some sort of interjection by the Judge. Given the pervasive extent of the interrogation of both these witnesses and the severe character of some of the questions, it is no wonder that the Judge discounted their evidence on credibility grounds (*e.g.*, Dec. 9). He may have and apparently did produce the physical reaction which led to his adverse assessments of demeanor and believability, and were we to reach the merits, we would experience great difficulty in accepting those assessments since he was in actuality both cross-examiner and trier of fact.

Based on the foregoing, we are of the opinion that the Administrative Law Judge became too involved with the evidentiary presentations of both parties, and to paraphrase

<sup>19</sup> We feel constrained to point out that this example is just one among several actions by the Judge which affected Parks adversely. A considerably more important one concerns the Judge's posthearing actions in apparently making the arbitration transcript a part of the record. *See* n. 9, *supra*.

Canon 15 of the *Canons of Judicial Ethics*, his undue interference and participation in the examining of witnesses, as well as the form of many of his questions at critical moments, prevented the proper presentation of the cause and the ascertainment of the truth with respect thereto. His persistent inability to refrain from assuming the mantle of an advocate, the indelible impression which the hearing must have left upon his mind, and the lingering impact of his behavior upon the witnesses persuade us that the fair rehearing of this case and the best interests of both parties would be served by remanding for assignment to another Judge under our broadly defined powers set forth in 43 CFR 4.603.

Before closing, we want to underscore several points. The record we have reviewed here is truly exceptional. Since the inception of adjudication under the Act, we have reviewed numerous case records and almost without exception the Administrative Law Judges have exercised suitable restraint and have avoided allowing their objectivity to be compromised by hyperactivity on the bench. In remanding here, we are not implicitly suggesting that questioning from the bench is a general problem in the Office of Hearings and Appeals requiring discouragement, and we are not, as Parks suggests, placing restraints on the Administrative Law Judges which will preclude the truth from emerging. We remain of the view expressed early last year in *Eastern*

*Associated Coal Corporation*, 4 IBMA 1, 82 I.D. 22, 1974-1975 OSHD par. 19,224 (1975). We said there that an Administrative Law Judge is not a purely passive figure refereeing a sports match. He or she has an affirmative responsibility to exercise his or her discretion to expedite the processing of cases and to make a full record consistent with adequate consideration of the conflicting assertions of fact and law tendered for initial decision. In instances where, as here, an appellant claims an abuse of discretion in questioning of witnesses by a Judge and seeks a new hearing, he or she will prevail only by showing glaring abuse and equally glaring prejudice, that is to say, the kind of abuse and the extent of damage to the truth-seeking process which was shown in this case.

### ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the motions by Parks for correction of the record and for permission to file a brief 20 pages in excess of the 25-page limit in 43 CFR 4.601(d) ARE GRANTED, and the order below precluding the attorneys from consulting with their respective clients regarding the alleged Driftwood Inn incident IS VACATED.

IT IS FURTHER ORDERED that the initial decision below IS SET ASIDE and that this case BE

REMANDED to the Chief Administrative Law Judge for assignment to himself or another Administrative Law Judge as he deems appropriate, and for expedited proceedings not inconsistent with the foregoing opinion.

IT IS ALSO ORDERED that upon remand responses to any question asked by Judge Kennedy in the initial hearing of this case MAY NOT BE USED for the purpose of impeachment and the Administrative Law Judge SHALL PROVIDE the parties an opportunity to

examine the official case file and to make such motions or enter such stipulations as they desire following such examination with respect to any defacement of the record.

DAVID TORBETT,  
*Alternate Administrative Judge.*

WE CONCUR:

DAVID DOANE,  
*Chief Administrative Judge.*

HOWARD J. SCHELLENBERG, JR.,  
*Administrative Judge.*

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(Note—See front of this volume for tables.)

## ACT OF APRIL 24, 1820

1. The Secretary of the Interior does not have authority under the Right-of-Way Oil and Gas Leasing Act of May 21, 1930, 30 U.S.C. § 301 *et seq.* (1970), to dispose of deposits of oil and gas underlying a railroad right-of-way granted pursuant to the Act of Mar. 3, 1875, when the lands traversed by the right-of-way were later patented under the Act of Apr. 24, 1820, without any reservation for minerals. In such case, title to the mineral estate was included within the grant to the patentee-----

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1. Where the purchaser from the railroad of unpatented land believed at the time of his purchase that the land was mineral, and there was physical evidence of its mineral character, or if conditions were such that the purchaser should have known then that the land was excepted from the grant to the railroad, he was not a purchaser in good faith within the "innocent purchaser" proviso of sec. 321(b) of the Transportation Act of 1940-----

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1. Although a respondent in a grazing license trespass hearing brought by the Bureau of Land Management has the right to be represented and aided by legal counsel, the Department has no duty or responsibility under the Constitution or the Administrative Procedure Act to provide such counsel for him-----
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  2. (b) All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.....
  3. (c) All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any

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1. Where the Bureau of Land Management determines that an Alaska Native allotment application should be rejected because the land was not used and occupied by the applicant, the BLM shall issue a contest complaint pursuant to 43 CFR 4.451 *et seq.* Upon receiving a timely answer to the complaint, which answer raises a disputed issue of material fact, the Bureau will forward the case file to the Hearings Division, Office of Hearings and Appeals, Department of the Interior, for assignment of an Administrative Law Judge, who will proceed to schedule a hearing at which the applicant may produce evidence to establish entitlement to his allotment..... 309
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2. The Decision of the Bureau of Land Management vacating the previously granted tentative approval and rejecting the land selection application of the State of Alaska must be vacated and remanded for further proceedings when it does not appear that the land selection application by the Native Corporation has been adjudicated.... 686

**Appeals**

**Jurisdiction**

1. Issues arising from GSA's disposal of lands as "surplus property" pursuant to the Federal Property and Administrative Services Act, *supra*, are not within the jurisdiction of the Board..... 476

**ALASKA NATIVE CLAIMS SETTLEMENT ACT—Continued**

**ALASKA NATIVE CLAIMS APPEAL BOARD—Continued**

**Appeals—Continued**

**Jurisdiction—Continued**

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2. The Alaska Native Claims Appeal Board does not have jurisdiction to adjudicate the Secretary's authority to withdraw and reserve public lands for a utility and transportation corridor within the meaning of sec. 17(c) of the Alaska Native Claims Settlement Act... 496
3. Under 43 CFR, Part 4, 4.1(5) and Subpart J, the Alaska Native Claims Appeal Board has jurisdiction over an appeal by the State of Alaska from an adverse decision of the Bureau of Land Management on a land selection application pursuant to the Alaska Statehood Act when the BLM's adverse decision is based upon a construction of the provisions of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1624 (Supp. IV, 1974), as amended, 89 Stat. 1145 (1976)..... 686

**Standing**

1. The State of Alaska has standing to appeal a Decision of the Bureau of Land Management to the Alaska Native Claims Appeal Board as a party "who claims a property interest in land affected" by a Decision of the Bureau of Land Management, within the meaning of 43 CFR 4.902, when the BLM Decision vacates

## ALASKA NATIVE CLAIMS SETTLEMENT ACT—Continued

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## Appeal—Continued

## Standing—Continued

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the tentative approval previously given to the State's selection and rejects the State's land selection application filed under the Alaska Statehood Act because of a conflict with the provisions of the Alaska Native Claims Settlement Act...

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## CONVEYANCES

## Reconveyances

1. Municipal corporations, organized to provide necessary government services, are beneficiaries of sec. 14(c) of ANCSA in that they received title to lands they use and occupy, and to additional lands for community expansion...

623

2. The Municipality's interest in lands improved for recognized public purposes is protected by sec. 14(c)(3) of ANCSA because the Municipality occupies the same position with regard to Eklutna as the local government entities envisioned by Congress in enacting such reconveyance provision and the disputed land, while outside Eklutna Village, is within the village withdrawal area and has been improved for a public purpose.....

623

## DEFINITIONS

## Generally

1. "Public lands" are defined in sec. 3(e) of the Alaska Native Claims Settlement Act, as follows:

## ALASKA NATIVE CLAIMS SETTLEMENT ACT—Continued

## DEFINITIONS—Continued

## Generally—Continued

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"Public lands" means all Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation, and (2) land selections of the State of Alaska which have been patented or tentatively approved under sec. 6(g) of the Alaska Statehood Act, *as amended* (72 Stat. 341, 77 Stat. 223), or identified for selection by the State prior to Jan. 17, 1969. The "except" clause contained in the definition of public lands in sec. 3(e) of ANCSA must be read as an expression of Congressional intent not to include particular lands rather than as an "exception" from lands included in the general definition of public lands.....

462

2. The definition of public lands in sec. 3(e) cannot be interpreted to mean that all classes of State land in Alaska are *necessarily* "Federal lands or interests therein" unless such classes of lands are specifically excepted within the definition itself.....

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## Land Selections

1. Lands conveyed to private parties by quitclaim deeds issued by the General Services Administration pursuant to the

## ALASKA NATIVE CLAIMS SETTLEMENT ACT—Continued

## DEFINITIONS—Continued

## Land selections—Con.

Federal Property and Administrative Services Act of 1949 *as amended*, 40 U.S.C. § 471 *et seq.* (1970), have ceased to be "Federal lands and interests therein;" are not within the definition of "public lands" in sec. 3(e) of ANCSA; and are, therefore, not available for selection-----

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## LAND SELECTIONS

## Generally

1. Selection of lands by Native Village Corporations pursuant to provisions of sec. 12(a) of ANCSA is not permitted outside of lands withdrawn by provisions of sec. 11(a)(1) as they relate to the location of the selecting village----- 454
2. Failing to select land available within its sec. 11(a)(1) withdrawal, a Native Village Corporation cannot by giving consent and waiver to another Native Village Corporation make said lands available for selection under provision of sec. 12(a) of ANCSA... 454
3. Where BLM's determination that lands are "property" not suitable for return to the public domain pursuant to the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 472(d) (1970), is not challenged, and the Administrator of the General Services Administration concurs, such determination and concurrence transfer the land from the adminis-

## ALASKA NATIVE CLAIMS SETTLEMENT ACT—Continued

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- trative jurisdiction of the Department of the Interior to that of GSA.... 476
4. Where an unlisted Native village qualified under sec. 11(b)(3) of ANCSA is subsequently annexed by a first class or home-rule city, which is not a Native village, such village does not by reason of such annexation become one and the same as the city so as to enable selection of land under 43 CFR 2650.6(a)----- 485
  5. Provision of sec. 12(a)(2) of ANCSA and regulations in 43 CFR § 2651.4(b) requiring selections to be "contiguous and in reasonably compact tracts," is limited to lands that are otherwise available for selection under ANCSA and has no application so as to make available lands which are prohibited from being selected under provisions of sec. 22(1) of ANCSA... 485
  6. A withdrawal of public lands for a utility and transportation corridor under sec. 17(c) of the Alaska Native Claims Settlement Act, subject to valid existing rights, precludes selection of those lands by a Native group under sec. 14(h) of the Alaska Native Claims Settlement Act.----- 496
  7. The provisions of sec. 12(a)(2) of ANCSA and regulations in 43 CFR sec. 2651.4 that lands selected—"be contiguous

## ALASKA NATIVE CLAIMS SETTLEMENT ACT—Continued

## LAND SELECTIONS—Continued

## Generally—Continued

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and in reasonably compact tracts"—are not inconsistent with a finding that townships are properly withdrawn under sec. 11(a) (1) (B) or (C) though actual physical cornering is prevented due to a township-offset resulting from location of a "standard parallel"-----

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8. Under 43 CFR, Part 4, 4.1(5) and Subpart J, the Alaska Native Claims Appeal Board has jurisdiction over an appeal by the State of Alaska from an adverse decision of the Bureau of Land Management on a land selection application pursuant to the Alaska Statehood Act when the BLM's adverse decision is based upon a construction of the provisions of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1624 (Supp. IV, 1974), as amended, 89 Stat. 1145 (1976)-----

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9. The State of Alaska has standing to appeal a Decision of the Bureau of Land Management to the Alaska Native Claims Appeal Board as a party "who claims a property interest in land affected" by a Decision of the Bureau of Land Management, within the meaning of 43 CFR 4.902, when the BLM Decision vacates the tentative approval previously given to the State's selection and rejects the State's land

## ALASKA NATIVE CLAIMS SETTLEMENT ACT—Continued

## LAND SELECTIONS—Continued

## Generally—Continued

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selection application filed under the Alaska Statehood Act because of a conflict with the provisions of the Alaska Native Claims Settlement Act-----

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10. The Decision of the Bureau of Land Management vacating the previously granted tentative approval and rejecting the land selection application of the State of Alaska must be vacated and remanded for further proceedings when it does not appear that the land selection application by the Native Corporation has been adjudicated-----

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## Entrymen

1. Sec. 22(b) is specific and unambiguous, reflecting the concern of Congress for a class of persons carefully described: i.e., entrymen under the Federal public land laws governing homesteads, headquarters sites, trade and manufacturing sites, and small tract sites-----
2. Sec. 22(b) of ANCSA is not applicable to, and does not protect, the Municipality because having an interest created by the State of Alaska under State law, it is not an entryman under Federal public land laws leading to acquisition of title to homesteads, headquarters sites, trade and manufacturing sites, or small tract sites-----

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LAND SELECTIONS—Continued

Entrymen—Continued

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3. ANCSA protects as "valid existing rights," those rights, whether derived from the State or Federal government, which do not lead to a grant of fee title and which were created prior to enactment of ANCSA. Rights leading to a fee, which had vested prior to enactment, would not be subject to Congressional disposal and would be excluded from withdrawals for Native selection. Rights of entrymen leading to grant of a fee under Federal public land laws, which had not vested prior to enactment of ANCSA, are treated by ANCSA as if vesting had occurred and are not categorized as "valid existing rights" ----- 622
4. The interests described in sec. 14(g) of ANCSA are of a temporary or limited nature, in contrast to those derived from laws leading to a grant of fee title such as the entries protected in sec. 22(b), and, therefore, are not incompatible with Native fee ownership of the land... 622
5. The Municipality is not protected under sec. 14(g) of ANCSA because its interest leads to grant of fee title by the State, if the State were able to issue patent; such an interest is incompatible with conveyance to a Native grantee as contemplated by sec. 14(g) -- 622

ALASKA NATIVE CLAIMS SETTLEMENT ACT—Continued

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1. The data upon which BLM has relied as the basis for compiling a protraction diagram will be deemed sufficient to determine boundaries of lands affected by the provisions of sec. 22(1) of ANCSA unless controverted by specific showing of error. 484

State Interests

Generally

1. The Municipality, as grantee of the State, could not acquire greater interests than its grantor and could not, prior to ANCSA, acquire equitable title; accordingly, any protection or priority afforded the Municipality must be statutory, conferred by ANCSA ----- 621
2. The Municipality is organized and may be dissolved under State law and presently has the power to exercise governmental functions including the acquisition, management, and disposal of land independent of control by the State. Until revoked or modified by constitutional or legislative amendment, such powers remain in force and render the Municipality and entity separate from the State for purposes of holding third-party interests under ANCSA ----- 621
3. Because the State was not prohibited by sec. 6(g) of the Statehood Act from granting tentatively approved lands to local governments, and neither the

# ALASKA NATIVE CLAIMS SETTLEMENT ACT—Continued

## LAND SELECTIONS—Continued

### State Interests—Continued

#### Generally—Continued

Statehood Act nor selection procedures in A.S. 29.18.190 require payment of consideration, the Municipality's interest in the disputed lands does not fail for lack of consideration-----

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#### Statehood Act Selections

#### Generally

1. Under 43 CFR, Part 4, 4.1(5) and Subpart J, the Alaska Native Claims Appeal Board has jurisdiction over an appeal by the State of Alaska from an adverse decision of the Bureau of Land Management on a land selection application pursuant to the Alaska Statehood Act when the BLM's adverse decision is based upon a construction of the provisions of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1624 (Supp. IV, 1974), as amended, 89 Stat. 1145 (1976)-----

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2. The State of Alaska has standing to appeal a Decision of the Bureau of Land Management to the Alaska Native Claims Appeal Board as a party "who claims a property interest in land affected" by a Decision of the Bureau of Land Management, within the meaning of 43 CFR 4.902, when the BLM Decision vacates the tentative approval previously given to the

# ALASKA NATIVE CLAIMS SETTLEMENT ACT—Continued

## LAND SELECTIONS—Continued

### State Interests—Continued

#### Statehood Act Selections—Continued

#### Generally—Continued

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State's selection and rejects the State's land selection application filed under the Alaska Statehood Act because of a conflict with the provisions of the Alaska Native Claims Settlement Act-----

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#### Tentative Approvals

1. Prior to ANCSA, the State's interest in its tentatively approved selections was subject to divestment upon proof of Native use and occupancy, and was subject to Congressional resolution of such claims. Unadjudicated claims of aboriginal title remained the only impediment to selection of such lands---
2. The express terms of secs. 11 and 12 of ANCSA make lands previously TA'd to the State of Alaska available for selection by qualified Native Corporations, indicating the conclusion of Congress that such lands were subject to disposal in settlement of Native claims-----
3. ANCSA provides in secs. 11(a)(2) and 12(a)(1) that each village may select up to 69,120 acres of its total entitlement from TA'd lands within the area, usually 25 townships, surrounding the village. Such State TA's, already encumbered by aboriginal title to lands on which use and occupancy could be proved, were now subject

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## ALASKA NATIVE CLAIMS SETTLEMENT ACT—Continued

## LAND SELECTIONS—Continued

## State Interests—Continued

## Statehood Act Selection—Continued

## Tentative Approvals—Continued

- to a statutory prior right of selection by village corporations; a Native right of selection, based not on aboriginal title, but on Congressional grant in ANCSA..... 620
4. The retroactive extinguishment of aboriginal title, and the resulting validation of State title, mandated by sec. 4(a) of ANCSA, applies to those lands tentatively approved to the State which are located outside Native village withdrawal areas. 620
5. Extinguishment of aboriginal title did not vest the State's title to those TA'd lands located within sec. 11(a)(2) withdrawal areas, for Congress clearly conferred on Native village corporations a superior right to select up to 69,120 acres of such lands..... 620
6. The State's interest in TA'd lands located within sec. 11(a)(2) withdrawal areas did not vest prior to ANCSA, and did not vest subsequent to ANCSA as to lands properly selected by village corporations within the 3-year period mandated by sec. 12(a)... 621
7. The State's interest vests in those TA's lands within sec. 11(a)(2) withdrawals not selected by village corporations within statutory deadlines, for, upon completion of Native selections, the last encumbrance on the State's title is removed..... 621

## ALASKA NATIVE CLAIMS SETTLEMENT ACT—Continued

## LAND SELECTIONS—Continued

## State Interests—Continued

## Statehood Act Selections—Continued

## Tentative Approvals—Continued

8. In withdrawing lands around villages tentatively approved to the State, Congress rejected the State's contention that tentative approval vested title in the State, and in consequence rejected the title the State had relied upon to dispose of TA'd lands to third parties..... 621
9. Secs. 11(a)(1) and 11(a)(2) of ANCSA direct withdrawals for village selections to be made subject to valid existing rights. The withdrawal of State TA'd lands in sec. 11(a)(2) impliedly recognizes the existence of third-party interests created by the State prior to ANCSA, by prohibiting the creation of such interests subsequent to the withdrawal..... 622
- Survey
1. Pursuant to provisions of sec. 13 of ANCSA and regulations in 43 CFR 2650.5, selection of lands shall be in conformance with the United States Survey System. Therefore, those provisions which apply to the rectangular system of surveys as provided in 43 U.S.C. §§ 751-774 (1970), are applicable to selection made under ANCSA..... 485
2. The smallest legal subdivision authorized pursuant to the rectangular system of surveys of the public lands, 43 U.S.C. §§ 751-774 (1970), is a quarter quarter section..... 485

## ALASKA NATIVE CLAIMS SETTLEMENT ACT—Continued

## LAND SELECTIONS—Continued

## Survey—Continued

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3. Unless all of the smallest legal subdivision, i.e.,  $\frac{1}{4}$ - $\frac{1}{4}$  of section, is within the prohibited two mile distance from the city boundary, BLM shall not reject said land for selection as being contrary to provisions of sec. 22(1) of ANCSA..... 485

## Third-Party Interests

1. The Municipality, as grantee of the State, could not acquire greater interests than its grantor and could not, prior to ANCSA, acquire equitable title; accordingly, any protection or priority afforded the Municipality must be statutory, conferred by ANCSA..... 621
2. The Municipality is organized and may be dissolved under State law and presently has the power to exercise governmental functions including the acquisition, management, and disposal of land independent of control by the State. Until revoked or modified by constitutional or legislative amendment, such powers remain in force and render the Municipality an entity separate from the State for purposes of holding third-party interests under ANCSA..... 621
3. Because the State was not prohibited by sec. 6(g) of the Statehood Act from granting tentatively approved lands to local governments, and neither the Statehood Act nor selec-

## ALASKA NATIVE CLAIMS SETTLEMENT ACT—Continued

## LAND SELECTIONS—Continued

## Third-Party Interests—Con.

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- tion procedures in A.S. 29.18.190 require payment of consideration, the Municipality's interest in the disputed lands does not fail for lack of consideration..... 621
4. Sec. 22(b) of ANCSA is not applicable to, and does not protect, the Municipality because having an interest created by the State of Alaska under State law, it is not an entryman under Federal public land laws leading to acquisition of title to homesteads, headquarters sites, trade and manufacturing sites, or small tract sites..... 622
5. Secs. 11(a)(1) and 11(a)(2) of ANCSA direct withdrawals for village selections to be made subject to valid existing rights. The withdrawal of State TA'd lands in sec. 11(a)(2) impliedly recognizes the existence of third-party interests created by the State prior to ANCSA, by prohibiting the creation of such interests subsequent to the withdrawal..... 622
6. The Municipality is not protected under sec. 14(g) of ANCSA because its interest leads to grant of fee title by the State, if the State were able to issue patent; such an interest is incompatible with conveyance to a Native grantee as contemplated by sec. 14(g)..... 622

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Third-Party Interests—Con.

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7. Municipal corporations, organized to provide necessary government services, are beneficiaries of sec. 14(c) of ANCSA in that they receive title to lands they use and occupy, and to additional lands for community expansion. . . . 6
8. The Municipality's interest in lands improved for recognized public purposes is protected by sec. 14(c)(3) of ANCSA because the Municipality occupies the same position with regard to Eklutna as the local government entities envisioned by Congress in enacting such reconveyance provision and the disputed land, while outside Eklutna Village, is within the village withdrawal area and has been improved for a public purpose. . . . 623

Valid Existing Rights

1. Secs. 11(a)(1) and 11(a)(2) of ANCSA direct withdrawals for village selections to be made subject to valid existing rights. The withdrawal of State TA'd lands in sec. 11(a)(2) impliedly recognizes the existence of third-party interests created by the State prior to ANCSA, by prohibiting the creation of such interests subsequent to the withdrawal. . . . 622
2. ANCSA protects as "valid existing rights," those rights, whether derived from the State or Federal

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Valid Existing Rights—Con.

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- government, which do not lead to a grant of fee title and which were created prior to enactment of ANCSA. Rights leading to a fee, which had vested prior to enactment, would not be subject to Congressional disposal and would be excluded from withdrawals for Native selection. Rights of entrymen leading to grant of a fee under Federal public land laws, which had not vested prior to enactment of ANCSA, are treated by ANCSA as if vesting had occurred and are not categorized as "valid existing rights." . . . 622
3. The interests described in sec. 14(g) of ANCSA are of a temporary or limited nature, in contrast to those derived from laws leading to a grant of fee title such as the entries protected in sec. 22(b), and, therefore, are not incompatible with Native fee ownership of the land. . . . 622

Village Selections

1. ANCSA provides in secs. 11(a)(2) and 12(a)(1) that each village may select up to 69,120 acres of its total entitlement from TA'd lands within the area, usually 25 townships, surrounding the village. Such State TA's, already encumbered by aboriginal title to lands on which use and occupancy could be proved, were now subject to a

## ALASKA NATIVE CLAIMS SETTLEMENT ACT—Continued

## LAND SELECTIONS—Continued

## Village Selections—Con.

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- statutory prior right of selection by village corporations; a Native right of selection, based not on aboriginal title, but on Congressional grant in ANCSA..... 620
2. Eklutna, Inc., is not estopped from selecting the disputed lands by Resolutions 68-9 and 68-10 of the Eklutna Village Council because there is no evidence of any identity of interest or membership between the Council, an unincorporated community association, and Eklutna, Inc., nor is there any indication that the Eklutna Village Council was authorized to bind the Natives of Palmer..... 621
3. Municipal corporations, organized to provide necessary government services, are beneficiaries of sec. 14(c) of ANCSA in that they received title to lands they use and occupy, and to additional lands for community expansion..... 623
4. The Municipality's interest in lands improved for recognized public purposes is protected by sec. 14(c)(3) of ANCSA because the Municipality occupies the same position with regard to Eklutna as the local government entities envisioned by Congress in enacting such reconveyance provision and the disputed land, while outside Eklutna Village,

## ALASKA NATIVE CLAIMS SETTLEMENT ACT—Continued

## LAND SELECTIONS—Continued

## Village Selections—Con.

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- is within the village withdrawal area and has been improved for a public purpose..... 623
- Withdrawals
1. Lands located outside of sec. 11(a)(1) withdrawal area for a Native Village Corporation can only be withdrawn for selection pursuant to provisions of sec. 11(a)(3)(A) of ANCSA..... 454
2. Because Alaska acquired a present right or interest in Mental Health Lands immediately upon proper selection of same, and because that interest effectively transfers ownership in the lands to the State, such lands can no longer be considered "public lands" within the meaning of sec. 3(e) and are unavailable for Native village selection under secs. 11(a)(1) and 12(a)(1) of ANCSA..... 462
3. Lands properly selected under the Alaska Mental Health Enabling Act are not "lands \* \* \* that have been selected \* \* \* by the State under the Alaska Statehood Act" and are not available for selection by Native villages under secs. 11(a)(2) and 12(a)(1) of ANCSA..... 463
4. Lands tentatively approved to the State under the Alaska Statehood Act are withdrawn for village selection by sec. 11(a)(2) of ANCSA. Because sec. 11(a)(2) withdrawals are terminated three years

**ALASKA NATIVE CLAIMS SETTLEMENT ACT—Continued**

**LAND SELECTIONS—Continued**

**Withdrawals—Con.**

from the date of enactment of ANCSA by sec. 22(h)(2), a village land selection filed subsequent to Dec. 18, 1974 for tentatively approved State lands must be rejected...

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**PRIMARY PLACE OF RESIDENCE**

**Filing Deadline**

**Waiver**

1. Sec. 14(h)(5) of the Alaska Native Claims Settlement Act establishes a mandatory deadline for applications for a primary place of residence, which may not be waived in the exercise of Secretarial discretion.....

449

**Intent to Reside without Evidence of Actual Residence is Insufficient to Establish Claim to Land as a Primary Place of Residence**

1. Sec. 14(h)(5) and 43 CFR 2653.0-5 of the Alaska Native Claims Settlement Act require that land applied for as a primary place of residence be occupied by the applicant as a primary place of residence on Aug. 31, 1971. "Primary place of residence" as contemplated by 43 CFR 2653.0-5(d) means a place comprising a primary place of residence of an applicant on Aug. 31, 1971, at which he regularly resides on a permanent or seasonal basis for a substantial period of time.....

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**ALASKA NATIVE CLAIMS SETTLEMENT ACT—Continued**

**SURVEY**

**Generally**

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1. Procedures adopted to implement the Public Land Survey System as provided in Title 43, Chapters 1 and 18, and regulations promulgated thereunder are made applicable to land withdrawals by sec. 13 of ANCSA.....
2. Establishing of "standard parallel" or "correction" lines in compliance with authorized procedure to implement Public Land Survey System is not inconsistent with provisions of sec. 11(a)(1) withdrawal.....

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3. Where townships, which by legal description have a common corner, are not in actual physical contact due solely to the location of a "standard parallel" or "correction" line, the requirement of sec. 11(a)(1)(B) or (C) that townships "corner" will be considered complied with.....

500

**Standing Parallel**

1. Where townships, which by legal description have a common corner, are not in actual physical contact due solely to the location of a "standard parallel" or "correction" line, the requirement of sec. 11(a)(1)(B) or (C) that townships "corner" will be considered complied with.....

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## ALASKA NATIVE CLAIMS SETTLEMENT ACT—Continued

## WAIVER

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1. Failing to select land available within its sec. 11(a) (1) withdrawal, a Native Village Corporation cannot by giving consent and waiver to another Native Village Corporation make said lands available for selection under provision of sec. 12(a) of ANCSA..... 454

## WITHDRAWALS

## Generally

1. Selection of lands by Native Village Corporations pursuant to provisions of sec. 12(a) of ANCSA is not permitted outside of lands withdrawn by provisions of sec. 11(a)(1) as they relate to the location of the selecting village.... 454
2. A withdrawal of public lands for a utility and transportation corridor under sec. 17(c) of the Alaska Native Claims Settlement Act, subject to valid existing rights, precludes selection of those lands by a Native group under sec. 14(h) of the Alaska Native Claims Settlement Act..... 496
3. The express terms of secs. 11 and 12 of ANCSA make lands previously TA'd to the State of Alaska available for selection by qualified Native Corporations, indicating the conclusion of Congress that such lands were subject to disposal in settlement of Native claims..... 620
4. The State's interest in TA'd lands located within sec. 11(a)(2) withdrawal areas did not vest prior to

## ALASKA NATIVE CLAIMS SETTLEMENT ACT—Continued

## WITHDRAWALS—Continued

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## Generally—Continued

- ANCSA, and did not vest subsequent to ANCSA as to lands properly selected by village corporations within the 3-year period mandated by sec. 12(a).... 621
  5. The State's interest vests in those TA'd lands within sec. 11(a)(2) withdrawals not selected by village corporations within statutory deadlines, for, upon completion of Native selections, the last encumbrance on the State's title is removed..... 621
  6. In withdrawing lands around villages tentatively approved to the State, Congress rejected the State's contention that tentative approval vested title in the State, and in consequence rejected the title the State had relied upon to dispose of TA'd lands to third parties... 621
  7. Secs. 11(a)(1) and 11(a)(2) of ANCSA direct withdrawals for village selections to be made subject to valid existing rights. The withdrawal of State TA'd lands in sec. 11(a)(2) impliedly recognizes the existence of third-party interests created by the State prior to ANCSA, by prohibiting the creation of such interests subsequent to the withdrawal..... 622
- Cornering
1. Where townships, which by legal description have a common corner, are not in actual physical contact due solely to the

**ALASKA NATIVE CLAIMS SETTLEMENT ACT—Continued**

**WITHDRAWALS—Continued**

**Cornering—Continued**

location of a "standard parallel" or "correction" line, the requirement of sec. 11(a)(1)(B) or (C) that townships "corner" will be considered complied with.....

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2. The provisions of sec. 12(a)(2) of ANCSA and regulations in 43 CFR sec. 2651.4 that lands selected—"be contiguous and in reasonably compact tracts"—are not inconsistent with a finding that townships are properly withdrawn under sec. 11(a)(1)(B) or (C) though actual physical cornering is prevented due to a township-offset resulting from location of a "standard parallel"....

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**Deficiency**

1. Lands located outside of sec. 11(a)(1) withdrawal area for a Native Village Corporation can only be withdrawn for selection pursuant to provisions of sec. 11(a)(3)(A) of ANCSA.....

454

**APPEALS**

(See also Contracts, Federal Coal Mine Health and Safety Act of 1969, Grazing Permits and Licenses, Indian Probate, Indian Tribes, Rules of Practice.)

1. Since the Bureau of Land Management has no authority to issue a public land order withdrawing land, such authority existing only in the Secretary, the Under Secretary, and the Assistant

**APPEALS—Continued**

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Secretaries of the Department of the Interior, recommendations by officers of the Bureau of Land Management relating to withdrawals are not subject to review under the provisions of 43 CFR 4.450-2 or 43 CFR 4.410.....

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**APPLICATIONS AND ENTRIES**

**VESTED RIGHTS**

1. The holder of equitable title has a vested interest; i.e., that interest, acquired by a party when all prerequisites for the acquisition of title have been complied with, which, attaching to the land, deprives Congress of its power to dispose of the property.....

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**APPRAISALS**

1. Under 43 U.S.C. § 961 (1970) and 43 CFR 2802.1-7(a), an applicant has no right to a hearing in connection with original charges for use and occupancy of a communication site, and a hearing pursuant to a request under 43 CFR 4.415 will not be granted where applicant fails to make specific allegations or offer specific proof to show in what factors a Departmental appraisal is in error.....

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2. Without convincing evidence that charges prescribed under 43 U.S.C. § 961 (1970) and 43 CFR 2802.1-7, for use and occupancy of a communication site are excessive, charges properly prescribed by an authorized

**APPRAISALS—Continued**

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| officer will be sustained<br>on appeal.....  | 332 |
| 3. Department regulation 43<br>CFR 2802.1-7 contem-<br>plates that a charge will<br>be initially established for<br>the entire term of the<br>grant of a communica-<br>tion site right-of-way--- | 332 |

**ATTORNEYS**

- |  |     |
|--|-----|
| 1. Although a respondent in a<br>grazing license trespass<br>hearing brought by the<br>Bureau of Land Manage-<br>ment has the right to be<br>represented and aided by<br>legal counsel, the Depart-<br>ment has no duty or re-<br>sponsibility under the<br>Constitution or the Ad-<br>ministrative Procedure<br>Act to provide such coun-<br>sel for him..... | 185 |
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**BONNEVILLE POWER ADMINIS-  
TRATION****GENERALLY**

- |  |     |
|--|-----|
| 1. The Bonneville Power Admin-<br>istrator has authority to<br>undertake or fund a study<br>or project to help re-<br>store the Columbia River<br>anadromous fishery if he<br>finds that such a study<br>or project is necessary or<br>appropriate to carry out<br>his power marketing re-<br>sponsibilities under the<br>Bonneville Project Act,<br>16 U.S.C. §§ 832-8321<br>(1970), and other related<br>statutes..... | 589 |
|--|-----|

**BOUNDARIES**

- |   |     |
|---|-----|
| 1. Courts have long recognized,<br>in determining bounda-<br>ries, that calls for natural<br>objects and fixed monu-<br>ments control those for<br>distances..... | 529 |
|---|-----|

**COLOR OR CLAIM OF TITLE****GENERALLY**

- |  |     |
|--|-----|
| 1. A color of title application for<br>land which has been with-<br>drawn for a stock-drive-<br>way prior to any con-<br>veyance in a color of title<br>applicant's chain of title<br>is properly rejected as to<br>such land.....   | 23  |
| 2. Possession of federal land for<br>the period of a state's<br>statute of limitations,<br>which may create title<br>rights in an adverse pos-<br>sessor to nonfederal land,<br>cannot affect the title of<br>land belonging to the<br>United States. Where<br>there is no other accept-<br>able basis for a belief that<br>a claimant has title other<br>than mere adverse pos-<br>session under such a<br>state law, there is no<br>claim or color of title<br>recognizable under the<br>Color of Title Act, 43<br>U.S.C. § 1068 (1970)..... | 617 |
| 3. A claim under the Color of<br>Title Act, 43 U.S.C.<br>§ 1068 (1970), must be<br>based upon a deed or<br>other document which on<br>its face purports to con-<br>vey the applicant the<br>land applied for.....  | 618 |

**APPLICATIONS**

- |  |    |
|--|----|
| 1. An applicant under the Color<br>of Title Act, 43 U.S.C.<br>§ 1068 (1970), has the<br>burden to establish to<br>the Secretary of the In-<br>terior's satisfaction that<br>the statutory conditions<br>for purchase under the<br>Act have been met..... | 23 |
|--|----|

**DESCRIPTION OF LAND**

- |  |  |
|--|--|
| 1. A color of title application is<br>properly rejected where<br>the applicant has failed to<br>establish how convey-<br>ances in her chain of title |  |
|--|--|

**COLOR OR CLAIM OF TITLE—Con.****DESCRIPTION OF LAND—Con.****Page**

describing lands different from that described in her application, and different from each other, give color of title to the applied for land for the requisite period of time...

23

2. Generally, conveyances which describe only a "possessory interest" in a parcel of land do not constitute a claim or color of title within the contemplation of the Color of Title Act.

23

**GOOD FAITH**

1. A color of title application is properly rejected where the applicant has failed to establish how conveyances in her chain of title describing lands different from that described in her application, and different from each other, give color of title to the applied for land for the requisite period of time...

23

2. Generally, conveyances which describe only a "possessory interest" in a parcel of land do not constitute a claim or color of title within the contemplation of the Color of Title Act.

23

**COMMUNICATION SITES**

1. Under 43 U.S.C. § 961 (1970) and 43 CFR 2802.1-7(a), an applicant has no right to a hearing in connection with original charges for use and occupancy of a communication site, and a hearing pursuant to a request under 43 CFR 4.415 will not be granted where applicant fails to make specific allegations or offer specific proof to show in what factors a

**COMMUNICATION SITES Con.****Page**

Departmental appraisal is in error.....

332

2. Without convincing evidence that charges prescribed under 43 U.S.C. § 961 (1970) and 43 CFR 2802.1-7 for use and occupancy of a communication site are excessive, charges properly prescribed by an authorized officer will be sustained on appeal.....

332

3. Department regulation 43 CFR 2802.1-7 contemplates that a charge will be initially established for the entire term of the grant of a communication site right-of-way.....

332

**COMMUNITY PROPERTY**

1. Rights under an executory contract to acquire property entered into by the husband alone are presumed to be community property under California law, and a conveyance as community property to husband and wife in settlement of litigation regarding the contract corroborates the presumption; both spouses stand on equal footing with respect to charges, based on the executory contract, of violating the acreage limitations in section 7 of the Desert Land Act, 43 U.S.C. § 329 (1970).....

281

**CONSTITUTIONAL LAW****DUE PROCESS**

1. Although a respondent in a grazing license trespass hearing brought by the Bureau of Land Management has the right to be represented and aided by

**CONSTITUTIONAL LAW—Con.****DUE PROCESS—Continued**

Page

legal counsel, the Department has no duty or responsibility under the Constitution or the Administrative Procedure Act to provide such counsel for him-----

185

**CONTESTS AND PROTESTS**

(See also Rules of Practice.)

**GENERALLY**

1. A federal district court jury verdict in a suit to cancel desert land patents, that the entrymen and their purchaser under an illegal executory contract did not commit fraud against the United States, does not collaterally estop this Department from adjudicating a contest grounded on the illegal executory contract against the purchaser's own entry, because the legal standard applicable in the subsequent contest is different than that in the fraud action—a desert land entry can be subject to cancellation for acts that do not constitute fraud-----

280

2. Where the Bureau of Land Management determines that an Alaska Native allotment application should be rejected because the land was not used and occupied by the applicant, the BLM shall issue a contest complaint pursuant to 43 CFR 4.451 *et seq.* Upon receiving a timely answer to the complaint, which answer raises a disputed issue of material fact, the Bureau will forward the case file to the Hearings Division,

**CONTESTS AND PROTESTS—Con.****GENERALLY—Continued**

Page

Office of Hearings and Appeals, Department of the Interior, for assignment of an Administrative Law Judge, who will proceed to schedule a hearing at which the applicant may produce evidence to establish entitlement to his allotment-----

309

3. In a mining contest, a matter not charged in the complaint may only be considered by the Administrative Law Judge if it was raised at the hearing without objection and the contestee was fully aware that the issue was raised.

609

**CONTRACTS**

(See also Delegation of Authority, Rules of Practice.)

**CONSTRUCTION AND OPERATION****Actions of Parties**

1. Insertion of the words "no exceptions" in a release executed by the contractor was held not to bar further consideration of the contractor's pending request for an extension of time where the Government's instructions for executing the release dealt only with claims in stated dollar amounts and directed the contractor to insert "no exceptions" if no such claims were to be filed and where in their conduct the parties did not treat the release as final.

353

**Changes and Extras**

1. Appellant's claim for an equitable adjustment under the changes clause for costs alleged to have been

## CONTRACTS—Continued

CONSTRUCTION AND OPERATION—  
Continued

## Changes and Extras—Con. Page

incurred when funds available for earnings became exhausted for 160 days is denied where construction was suspended more than 3 months ahead of the date on which appellant's earnings were scheduled to reach the amount of the fund reservation and where subsequent fund reservations kept the total amount of funds reserved for earnings above the scheduled earnings shown in appellant's own construction program which the Government had approved.....

118

2. Cross motions for summary judgment are denied where the Board finds the stipulated record furnishes an insufficient basis for an informed judgment and that a hearing will be required for determining the merits of the entitlement question presented for decision.....

148

3. Where in moving for reconsideration of a decision denying its claim for constructive acceleration, the contractor contended that the Bureau's failure to promptly investigate its claim of delay due to unusually severe weather amounted to a denial of a request for a time extension and that the denial plus other actions of Bureau inspectors constituted an order to complete the work by the

## CONTRACTS—Continued

CONSTRUCTION AND OPERATION—  
Continued

## Changes and Extras—Con. Page

specified completion date irrespective of excusable delay and thus was an acceleration order, the Board ruled that a denial of a request for a time extension was insufficient in and of itself to constitute constructive acceleration and reviewing the evidence, affirmed the denial of the claim, holding that the actions of the inspectors were regarded as suggestions by the contractor and accepted or rejected depending on whether the suggestions were practical or economical.....

179

## Conflicting Clauses

1. Appellant's claim for an equitable adjustment under the changes clause for costs alleged to have been incurred when funds available for earnings became exhausted and work on the contract was suspended for 160 days is denied where construction was suspended more than 3 months ahead of the date on which appellant's earnings were scheduled to reach the amount of the fund reservation and where subsequent fund reservations kept the total amount of funds reserved for earnings above the scheduled earnings shown in appellant's own construction program which the Government had approved..

118

**CONTRACTS—Continued****CONSTRUCTION AND OPERATION—Con.****General Rules of Construction**

1. Cross motions for summary judgment are denied where the Board finds the stipulated record furnishes an insufficient basis for an informed judgment and that a hearing will be required for determining the merits of the entitlement question presented for decision-----

148

**Government-Furnished****Property**

1. A cost-plus-fixed-fee contractor's claim for costs in excess of the estimated cost of the contract, incurred in correcting deficiencies in Government-furnished property, was denied where the contractor knew or should have known that costs being incurred would exceed the estimated cost, but failed to give the notice required by the Limitation of Cost clause and the evidence failed to furnish any basis for excusing the contractor's failure to give the required notice. The contractor's claim for additional fee on the extra work was sustained since the Limitation of Cost clause is not applicable to such claims-----

95

**Protests**

1. Where a construction contractor contended that the contracting officer's enforcement of a contract requirement for roll-over protective structures on all equipment regardless

**CONTRACTS—Continued****CONSTRUCTION AND OPERATION—Con.****Protests—Continued**

Page

of age constituted a change because the requirement was contrary to standards issued by the Secretary of Labor under the Occupational Health & Safety Act (29 U.S.C. § 651 *et seq.*) and therefore void, the Board examined the contention in the light of OSHA and also under the Contract Work Hours and Safety Standards Act (40 U.S.C. § 327 *et seq.*) and concluded that, while it was unlikely that either statute was intended to preclude a Federal agency from contractually imposing more stringent safety requirements than prescribed by the Secretary of Labor, it was not necessary to decide the question since appellant's remedy for an alleged illegal clause was a protest in other forums prior to bidding and award---

43

**DISPUTES AND REMEDIES****Generally**

1. Where a construction contractor contended that the contracting officer's enforcement of a contract requirement for roll-over protective structures on all equipment regardless of age constituted a change because the requirement was contrary to standards issued by the Secretary of Labor under the Occupational Health & Safety Act (29 U.S.C. § 651 *et seq.*) and therefore void, the Board examined the contention

**CONTRACTS—Continued****DISPUTES AND REMEDIES—Continued****Generally—Continued**

Page

in the light of OSHA and also under the Contract Work Hours and Safety Standards Act (40 U.S.C. § 327 *et seq.*) and concluded that, while it was unlikely that either statute was intended to preclude a Federal agency from contractually imposing more stringent safety requirements than prescribed by the Secretary of Labor, it was not necessary to decide the question since appellant's remedy for an alleged illegal clause was a protest in other forums prior to bidding and award-----

43

**Burden of Proof**

1. Where in moving for reconsideration of a decision denying its claim for constructive acceleration, the contractor contended that the Bureau's failure to promptly investigate its claim of delay due to unusually severe weather amounted to a denial of a request for a time extension and that the denial plus other actions of Bureau inspectors constituted an order to complete the work by the specified completion date irrespective of excusable delay and thus was an acceleration order, the Board ruled that a denial of a request for a time extension was insufficient in and of itself to constitute constructive acceleration and reviewing the evidence, af-

**CONTRACTS—Continued****DISPUTES AND REMEDIES—Continued****Burden of Proof—Con.**

Page

firmed the denial of the claim, holding that the actions of the inspectors were regarded as suggestions by the contractor and accepted or rejected depending on whether the suggestions were practical or economical-----

179

2. When the contractor is at fault for failure to perform the contract within the contract period and cannot establish any cause for an excusable delay, the Government is justified in terminating the contract for default and assessing excess reprocurement costs and liquidated damages-----

297

3. Where the Government failed to explain the presence of water which entered a 230 KV reactor while the reactor was under Government control and protected by Government security measures and where the water caused more extensive repairs to the reactor than would otherwise have been necessary, the Board found no basis for determining the portion of the delay for which each party was responsible and held that liquidated damages could not be charged for any of the delay-----

354

**Damages****Liquidated Damages**

1. Where the Government failed to explain the presence of water which entered a 230 KV reactor while the reactor was under Government control and pro-

## CONTRACTS—Continued

## DISPUTES AND REMEDIES—Continued

## Damages—Continued

## Liquidated Damages—Continued

Page

ected by Government security measures and where the water caused more extensive repairs to the reactor than would otherwise have been necessary, the Board found no basis for determining the portion of the delay for which each party was responsible and held that liquidated damages could not be charged for any of the delay-----

354

## Jurisdiction

1. An appeal by a concessionaire at a wildlife refuge who alleges that Government harassment of the public, failure to repair roads and other actions resulted in a decrease of business and who seeks therefor to be relieved of payment of a semi-annual franchise fee of 3 percent of gross receipts required under the concession agreement and given the right to sell beer, *inter alia*, is dismissed for lack of jurisdiction, since the agreement contains no adjustment provisions and the relief requested entails reformation of the agreement, but is remanded to the contracting officer, who has wide discretion under the agreement to provide relief, for further consideration in the light of the Board's opinion--

445

## Termination for Default

## Generally

1. Where a construction contractor failed to appeal from a notice of termina-

## CONTRACTS—Continued

## DISPUTES AND REMEDIES—Continued

## Termination for Default—Continued

## Generally—Continued

Page

tion for default which included findings that the contractor's delay in performing the work was not due to excusable causes, but did file a timely appeal from a damage assessment for, *inter alia*, the increased cost of completing the work, the Board denied the Government's motion to strike paragraphs of the complaint alleging that the contractor's delay was due to excusable causes and that the termination for default was improper since under the so-called *Fulford* doctrine, which has been held equally applicable to construction contracts, an appeal from a damage or excess cost assessment following a termination for default allows the contractor to contest the propriety of the termination-----

137

2. Where certain paragraphs of a complaint filed by a construction contractor in an appeal from a damage assessment following a termination for default raised issues as to the propriety of the termination, the Board denied a Government motion to strike those paragraphs based on contentions that the contractor had agreed that delay in completion of the work was not excusable and that the contractor's agreement to a revised date for completion of the work pre-

**CONTRACTS—Continued**

**DISPUTES AND REMEDIES—Continued**

**Termination for Default—Continued**

**Generally—Continued**

cluded it from raising issues as to the excusability of delays occurring prior to the agreement, since it is well settled that accord and satisfaction is an affirmative defense which must be pleaded and proved and that allegations of accord and satisfaction raise factual issues as to the intent of the parties at the time of the alleged accord.-----

Page

137

**Excess Costs**

1. When the contractor is at fault for failure to perform the contract within the contract period and cannot establish any cause for an excusable delay, the Government is justified in terminating the contract for default and assessing excess procurement costs and liquidated damages.-----

297

**FORMATION AND VALIDITY**

**Authority to Make**

1. Where a construction contractor contended that the contracting officer's enforcement of a contract requirement for roll-over protective structures on all equipment regardless of age constituted a change because the requirement was contrary to standards issued by the Secretary of Labor under the Occupational Health & Safety Act (29 U.S.C. § 651 *et seq.*) and therefore void, the Board examined the contention

**CONTRACTS—Continued**

**FORMATION AND VALIDITY—Con.**

**Authority to Make—Con.**

Page

in the light of OSHA and also under the Contract Work Hours and Safety Standards Act (40 U.S.C. § 327 *et seq.*) and concluded that, while it was unlikely that either statute was intended to preclude a Federal agency from contractually imposing more stringent safety requirements than prescribed by the Secretary of Labor, it was not necessary to decide the question since appellant's remedy for an alleged illegal clause was a protest in other forums prior to bidding and award.-----

43

**Cost-type Contracts**

1. A cost-plus-fixed-fee contractor's claim for costs in excess of the estimated cost of the contract, incurred in correcting deficiencies in Government-furnished property, was denied where the contractor knew or should have known that costs being incurred would exceed the estimated cost, but failed to give the notice required by the Limitation of Cost clause and the evidence failed to furnish any basis for excusing the contractor's failure to give the required notice. The contractor's claim for additional fee on the extra work was sustained since the Limitation of Cost clause is not applicable to such claims.-----

59

**CONTRACTS—Continued**  
**PERFORMANCE OR DEFAULT**

**Acceleration**

1. Where in moving for reconsideration of a decision denying its claim for constructive acceleration, the contractor contended that the Bureau's failure to promptly investigate its claim of delay due to unusually severe weather amounted to a denial of a request for a time extension and that the denial plus other actions of Bureau inspectors constituted an order to complete the work by the specified completion date irrespective of excusable delay and thus was an acceleration order, the Board ruled that a denial of a request for a time extension was insufficient in and of itself to constitute constructive acceleration and reviewing the evidence, affirmed the denial of the claim, holding that the actions of the inspectors were regarded as suggestions by the contractor and accepted or rejected depending on whether the suggestions were practical or economical.-----

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179

**Excusable Delays**

1. When the contractor is at fault for failure to perform the contract within the contract period and cannot establish any cause for an excusable delay, the Government is justified in terminating the contract for default and assessing excess reprocurement costs and liquidated damages.-----

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**CONTRACTS—Continued**  
**PERFORMANCE OR DEFAULT—Con.**

**Excusable Delays—Con.**

Page

2. Where the Government failed to explain the presence of water which entered a 230 KV reactor while the reactor was under Government control and protected by Government security measures and where the water caused more extensive repairs to the reactor than would otherwise have been necessary, the Board found no basis for determining the portion of the delay for which each party was responsible and held that liquidated damages could not be charged for any of the delay.-----

354

**Release and Settlement**

1. Where certain paragraphs of a complaint filed by a construction contractor in an appeal from a damage assessment following a termination for default raised issues as to the propriety of the termination, the Board denied a Government motion to strike those paragraphs based on contentions that the contractor had agreed that delay in completion of the work was not excusable and that the contractor's agreement to a revised date for completion of the work precluded it from raising issues as to the excusability of delays occurring prior to the agreement, since it is well settled that accord and satisfaction is an affirmative defense which must

**CONTRACTS—Continued**

**PERFORMANCE OR DEFAULT—Con.**

**Release and Settlement—Continued**

Page

be pleaded and proved and that allegations of accord and satisfaction raise factual issues as to the intent of the parties at the time of the alleged accord.....

137

2. Insertion of the words "no exceptions" in a release executed by the contractor was held not to bar further consideration of the contractor's pending request for an extension of time where the Government's instructions for executing the release dealt only with claims in stated dollar amounts and directed the contractor to insert "no exceptions" if no such claims were to be filed and where in their conduct the parties did not treat the release as final...

353

**Suspension of Work**

1. Appellant's claim for an equitable adjustment under the changes clause for costs alleged to have been incurred when funds available for earnings became exhausted and work on the contract was suspended for 160 days is denied where construction was suspended more than 3 months ahead of the date on which appellant's earnings were scheduled to reach the amount of the fund reservation and where subsequent fund reservations kept the total amount of funds reserved for earnings above the scheduled

**CONTRACTS—Continued**

**PERFORMANCE OR DEFAULT—Con.**

**Suspension of Work—Con.**

Page

earnings shown in appellant's own construction program which the Government had approved..

118

**Waiver and Estoppel**

1. A cost-plus-fixed-fee contractor's claim for costs in excess of the estimated cost of the contract, incurred in correcting deficiencies in Government-furnished property, was denied where the contractor knew or should have known that costs being incurred would exceed the estimated cost, but failed to give the notice required by the Limitation of Cost clause and the evidence failed to furnish any basis for excusing the contractor's failure to give the required notice. The contractor's claim for additional fee on the extra work was sustained since the Limitation of Cost clause is not applicable to such claims.....

95

**CONVEYANCES**

**GENERALLY**

1. Where the purchaser from the railroad of unpatented land believed at the time of his purchase that the land was mineral, and there was physical evidence of its mineral character, or if conditions were such that the purchaser should have known then that the land was excepted from the grant to the railroad, he was not a purchaser in good faith within the "innocent purchaser" proviso of section 321(b)

**CONVEYANCES—Continued****GENERALLY—Continued**

- |   |    |
|---|----|
| of the Transportation Act of 1940-----  | 1  |
| 2. A color of title application is properly rejected where the applicant has failed to establish how conveyances in her chain of title describing lands different from that described in her application, and different from each other, give color of title to the applied for land for the requisite period of time-- | 23 |
| 3. Generally, conveyances which describe only a "possessory interest" in a parcel of land do not constitute a claim or color of title within the contemplation of the Color of Title Act--  | 23 |

**INTEREST CONVEYED**

- |   |     |
|---|-----|
| 1. In the absence of legislation by Congress, a patent from the United States does not convey an implied easement by way of necessity across public land----- | 518 |
|---|-----|

**DELEGATION OF AUTHORITY****EXTENT OF**

- |  |     |
|--|-----|
| 1. Since the Bureau of Land Management has no authority to issue a public land order withdrawing land, such authority existing only in the Secretary, the Under Secretary, and the Assistant Secretaries of the Department of the Interior, recommendations by officers of the Bureau of Land Management relating to withdrawals are not subject to review under the provisions of 43 CFR 4.450-2 or 43 CFR 4.410----- | 313 |
|--|-----|

**DESERT LAND ENTRY****GENERALLY**

- |   |     |
|---|-----|
| 1. A federal district court jury verdict in a suit to cancel desert land patents, that the entrymen and their purchaser under an illegal executory contract did not commit fraud against the United States, does not collaterally estop this Department from adjudicating a contest grounded on the illegal executory contract against the purchaser's own entry, because the legal standard applicable in the subsequent contest is different than that in the fraud action—a desert land entry can be subject to cancellation for acts that do not constitute fraud-- | 280 |
| 2. "Hold by assignment or otherwise." The purchaser of desert land under an illegal executory contract to convey the land subsequent to patent "holds" that land within the meaning of the acreage limitation of section 7 of the Desert Land Act, as amended, 43 U.S.C. § 329 (1970)-----  | 281 |
| 3. Rights under an executory contract to acquire property entered into by the husband alone are presumed to be community property under California law, and a conveyance as community property to husband and wife in settlement of litigation regarding the contract corroborates the presumption; both spouses stand on equal footing with respect to charges, based on the executory   |     |

**DESERT LAND ENTRY—Con.****GENERALLY—Continued**

Page

contract, of violating the acreage limitations in section 7 of the Desert Land Act, 43 U.S.C. §329 (1970)----- 281

**CANCELLATION**

1. In the case of a desert land entry contestee who violates the 320-acre limitation on holding desert land because he is the "purchaser" of two other 320-acre entries under an illegal executory contract to convey after patent, all entries held by the "purchaser" are subject to cancellation, and the Department may proceed by way of contest against the "purchaser's" own entry, which was not a subject of the illegal contract----- 281

2. The doctrine of voluntary rescission—which allows an entryman, who was, although in good faith, party to a contract that violated the desert land law, to proceed to the merits of his proof upon repudiation of the contract—will not be applied when: (1) repudiation of the contract was not truly voluntary; (2) the rescission occurred long after the entries' lives expired; (3) the illegal contract involved a complex of four entries; and (4) no other mitigating circumstances are present----- 281

**FINAL PROOF**

1. The doctrine of voluntary rescission—which allows an entryman, who was, although in good faith,

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**DESERT LAND ENTRY—Con.****FINAL PROOF—Continued**

Page

party to a contract that violated the desert land law, to proceed to the merits of his proof upon repudiation of the contract—will not be applied when: (1) repudiation of the contract was not truly voluntary; (2) the rescission occurred long after the entries' lives expired; (3) the illegal contract involved a complex of four entries; and (4) no other mitigating circumstances are present----- 281

**FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969****ABATEMENT****Withdrawal Orders**

1. When an inspector finds that an operator has failed to abate a violation within the time originally fixed in a sec. 104(b) notice, he abuses his enforcement discretion by issuing a withdrawal order if, in the circumstances, the time for abatement should be further extended. 30 U.S.C. § 814 (b) (1970)----- 335

**ADMINISTRATIVE PROCEDURE****Defaults****Generally**

1. Under 43 CFR 4.544, an Administrative Law Judge abuses his discretion in denying a motion to enter a default for failure to file an answer where the sole excuse for such failure is the Respondent's voluntary refusal to assign personnel or hire an attorney to perform that task----- 88

# FEDERAL COAL MINE HEALTH AND SAFETY ACT—Continued

## ADMINISTRATIVE PROCEDURE—Con.

### Defaults

#### Affirmative Defenses

- |  |            |
|--|------------|
| 1. In a default proceeding, an Administrative Law Judge errs by sua sponte raising an affirmative defense. 43 CFR 4.582----- | Page<br>92 |
|--|------------|

#### Reconsideration

- |   |     |
|---|-----|
| 1. Where an initial decision has been issued and a notice of appeal has been filed with the Board of Mine Operations Appeals, an Administrative Law Judge is precluded by 43 CFR 4.582(c) from granting a subsequently filed motion for reconsideration, there being no jurisdiction----- | 207 |
|---|-----|

## APPEALS

### Generally

- |   |     |
|---|-----|
| 1. Where a party fails to raise an issue in prehearing pleadings, or at the hearing, it is precluded from doing so before the Board unless such issue involves jurisdiction or mootness-- | 351 |
|---|-----|

## APPLICATIONS FOR REVIEW

### Issues

- |  |     |
|--|-----|
| 1. An Administrative Law Judge may not decide an issue not properly raised in an Application for Review nor agreed upon by the parties unless it pertains to jurisdiction----- | 704 |
|--|-----|

### Pleading

- |  |  |
|--|--|
| 1. Where an applicant has filed an application for review containing an incomplete request for relief, but later makes clear all the specifics of the relief desired <i>without objection</i> , a responding party shall be deemed on appeal to have |  |
|--|--|

# FEDERAL COAL MINE HEALTH AND SAFETY ACT—Continued

## APPLICATIONS FOR REVIEW—Continued

### Pleading—Continued

- |   |             |
|---|-------------|
| waived any claim of error below based upon an Administrative Law Judge's decision to grant the portion of the relief ultimately requested but not mentioned in such application. 43 CFR 4.532(a)(1) - | Page<br>335 |
|---|-------------|

## ENTITLEMENT OF MINERS

### Generally

- |   |     |
|---|-----|
| 1. Miners are entitled to compensation under sec. 110(a) of the Act when secs. 103(f) and 104(c) withdrawal orders are in effect concurrently even if the 103(f) order was issued first. Such compensation, however, is computed with reference only to the duration of the sec. 104(c) orders--- | 28  |
| 2. Responsibility for the enforcement of sec. 203(b) (3) is vested in the Secretary of the Interior. 30 U.S.C. §843(b)(3) (1970) -  | 690 |

### Compensation

#### Generally

- |   |     |
|---|-----|
| 1. Miners are entitled to compensation under sec. 110(a) of the Act when secs. 103(b) and 104(c) withdrawal orders are in effect concurrently even if the 103(f) order was issued first. Such compensation, however, is computed with reference only to the duration of the sec. 104(c) orders--- | 28  |
| 2. The phrase "regular rate of pay," as used in sec. 203(b)(3), means the rate of compensation due a miner under his job classification under the current wage agreement-----   | 690 |

**FEDERAL COAL MINE HEALTH  
AND SAFETY ACT—Continued**

**ENTITLEMENT OF MINERS—Con.**

**Discharge**

**Generally**

1. In order to conclude that a discharge occurs “\* \* \* by reason of the fact that \* \* \*” a miner has engaged in protected reporting activities, an Administrative Law Judge must find that such discharge would not have occurred but for such activities. 30 U.S.C. § 820(b)(1)(A) (1970)---

59

**Legitimate Cause**

1. Where an operator asserts and establishes a legitimate cause for discharge, the applicant for review must show by affirmative persuasive evidence that the invocation of such cause was a pretext for an unlawful motive in order to show a violation of sec. 110(b)(1). 30 U.S.C. § 820(b)(1) (1970)-----

59

**Discrimination**

**Hearings**

**Pleading**

1. Where an applicant for review seeks relief only for an allegedly discriminatory discharge, an allegation to the effect that an act which preceded such discharge was discriminatory states a conclusion of law which is mere surplusage. 30 U.S.C. § 820(b)(2) (1970). 43 CFR 4.562(d)-----

59

**EVIDENCE**

**Adverse Witnesses**

1. In a civil penalty proceeding brought pursuant to sec. 109(a)(3) of the Act, it is entirely proper for the

**FEDERAL COAL MINE HEALTH  
AND SAFETY ACT—Continued**

**EVIDENCE—Continued**

**Adverse Witnesses—Con.**

Page

Mining Enforcement and Safety Administration to call to the stand and examine the adverse party's principal witness and to rely upon such testimony in an effort to make out a prima facie case-----

88

**Credibility of Testimony**

1. Where substantial evidence of record corroborates the findings of the trial judge that the testimony of the witness for one party is more credible than testimony of the witnesses for another party, the Board, on appeal, will not disturb such finding of credibility-----

341

**Photographs**

**Probative Weight**

1. Where photographs are introduced in evidence, particularly for the purpose of showing shade and color, and the party introducing such evidence fails to establish the accuracy thereof in terms of being true representations of the shade and color of the subject of such photographs, it is proper for the trier of fact to give no probative weight to such evidence.

341

**Relevancy**

1. Where an Administrative Law Judge refuses to accord probative value to certain admitted evidence on the ground that such evidence is irrelevant, he errs when his conclusion

**FEDERAL COAL MINE HEALTH  
AND SAFETY ACT—Continued**  
EVIDENCE—Continued

**Relevancy—Continued** Page

of irrelevancy is based  
upon mere presumption  
and surmise without evi-  
dentiary foundation----- 580

**HEARINGS**

**Abuse of Discretion**

1. An Administrative Law Judge does not abuse his discretion by entering a default against an operator for failure to appear at a scheduled hearing after waiting for 38 minutes, and where the operator offers no excuse on the day scheduled for hearing for its tardiness but on the next day explains to the judge that the delay was due to "unforeseen traffic conditions"----- 257

**Notice and Service**

1. An operator is given fair notice of the type and number of violations charged where an order of withdrawal specifically enumerates conditions and alleges that each such condition is a violation of a specific mandatory safety standard----- 351

**Pleading**

1. The acceptance by the Administrative Law Judge of an answer to an order to show cause indicating the operator's desire for hearing and the subsequent issuance of a notice scheduling a hearing relieve the operator of the obligation to file an additional answer, and matters set forth in the Petition for Assess-

**FEDERAL COAL MINE HEALTH  
AND SAFETY ACT OF 1969—Con.**  
HEARINGS—Continued

**Pleading—Continued** Page

ment of Civil Penalty  
are deemed to have been  
generally denied by the  
operator----- 256.

**Powers of Administrative  
Law Judges**

1. Where an individual complied with the "self-certification" requirements of the regulations, actions by an Administrative Law Judge in determining that an individual was ineligible to practice before Department and by the Board of Mine Operations Appeals to continue further consideration of the appeal pending a decision on the issue by the Solicitor, were unauthorized since the denial of an individual's right to practice before the Department in these circumstances constituted a disciplinary action which is within the sole authority of the Solicitor to adjudicate; therefore, the matter should have been referred to the Solicitor at the outset and the appeal should not have been delayed without the express approval of the Solicitor----- 131
2. The authority of an Administrative Law Judge to issue show cause orders pursuant to 43 CFR 4.544(b) necessarily implies the authority to consider whether a response is adequate in showing cause why a default decision should

FEDERAL COAL MINE HEALTH  
AND SAFETY ACT OF 1969—Con.

## HEARINGS—Continued

## Law Judges—Continued

## Powers of Administrative

not be entered against  
the respondent-----

Page

220

## 3. An Administrative Law

Judge may sequester wit-  
nesses upon proper mo-  
tion, but he may *not*

*generally* preclude an at-  
torney from consulting  
with a willing witness.

43 CFR 4.582-----

710

## 4. In a case, where the record

shows that an Adminis-  
trative Law Judge has

clearly and grossly  
abused his discretion to

the prejudice of both  
parties by undue and im-

proper interrogation of  
witnesses and unneces-

sary interference in the  
presentation of a case, the

Board may grant a new  
hearing before another

trier of fact. 43 CFR  
4.603-----

710

## Summary Decisions

## 1. Where no party has moved

for summary decision  
under 43 CFR 4.590, it

is error for an Adminis-  
trative Law Judge to use

that regulation as a basis  
for proceeding to a deci-

sion in the absence of a  
hearing-----

419

## Waiver

## 1. Where a party to a proceeding

has requested a hearing  
and there has been no

unequivocal waiver there-  
of in writing, a hearing is

required to be conducted  
by the provisions of 43

CFR 4.588, and failure to  
do so constitutes reversi-  
ble error-----

419

FEDERAL COAL MINE HEALTH  
AND SAFETY ACT OF 1969—Con.

## IMMINENT DANGER

## Proximate Peril

Page

## 1. A condition of float coal dust

accumulations in ener-  
gized electrical rectifier

and starting boxes where  
arcing and sparking

normally occur consti-  
tutes an imminent

danger. 30 U.S.C. § 814  
(1970)-----

37

## INCOMBUSTIBLE DUST PROGRAM

## Evidence

## Sufficiency

## 1. The unchallenged testimony

of an inspector that he  
followed instructions [de-

partmental directives]  
pertaining to the gather-

ing and packaging of dust  
samples, together with a

laboratory analysis of  
dust samples, unchal-

lenged by the operator,  
showing insufficient in-

combustible content, con-  
stitutes sufficient evi-

dence to establish a viola-  
tion of 30 CFR 75.403--

580

## MANDATORY HEALTH STANDARDS

Bathroom and Changeroom  
Facilities

## 1. A violation of 30 CFR

75.1712-2, requiring that  
bathing and change-room

facilities be provided in  
a central location con-

venient to all the miners  
where such facilities serve

the miners of more than  
one mine, is not proved

when the evidence shows  
that the average distance

from the six mines served  
is 2.1 miles and the portal

of the mine farthest from  
such facilities is only 1.1

miles farther than the  
portal of the nearest

mine-----

39

# FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969—Con.

## MANDATORY SAFETY STANDARDS

### Permissibility

#### Switches on Electric Face Equipment

Page

1. Failure to maintain the reset mechanism on electric face equipment in operative condition is not a violation of an operator's obligation under 30 CFR 75.505 to maintain electric face equipment in permissible condition.----- 425

### Roof Control Plans

#### Generally

1. The obligation to "carry out" the provisions of an adopted, approved, and effective roof control plan is a mandatory safety standard. The failure to "carry out" particular provisions of the plan is a violation of such standard. 30 U.S.C. §§ 802(l), 862(a). (1970)----- 108

#### Evidence

1. Where the undisputed evidence adduced by MESA established that the operator failed to have crossbars installed when hillseams are encountered as required by the roof control plan, the Mining Enforcement and Safety Administration made out a prima facie case of violation of sec. 302(a) of the Act. 30 U.S.C. § 862 (a). 30 CFR 75.200----- 552

### Spalling Ribs

1. Neither the fact that a condition, such as spalling ribs, is difficult to control nor the fact that such a condition is a natural condition of the mining process precludes an in-

# FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969—Con.

## MANDATORY SAFETY STANDARDS— Continued

### Spalling Ribs—Con.

Page

spector from properly issuing a notice of violation.  
30 CFR 75.200, 30 U.S.C. § 862(a)----- 552

## MODIFICATION OF APPLICATION OF MANDATORY SAFETY STANDARDS

### Generally

1. A petition for modification alleging in substance an erroneous interpretation of a mandatory safety standard by MESA does not state a claim upon which relief can be granted under sec. 301(c) of the Act. 30 U.S.C. § 861(c) (1970)----- 175
2. A petition for modification of the application of a regulation establishing criteria for approval of individual mine ventilation plans does not state a claim upon which relief can be granted under sec. 301(c) of the Act because such regulation is not a mandatory safety standard. 30 U.S.C. §§ 802(l), 861(c) (1970).... 225
3. A Petition for Modification of the application of 30 CFR 75.1405 alleging that the mandatory standard does not apply to rubber-rail equipment which operates both on and off track fails to state a claim for which relief can be granted under sec. 301(c) of the Act. 30 U.S.C. § 861(c) (1970)----- 406
4. An Administrative Law Judge lacks discretion under sec. 301(c) to grant an operator purely declaratory relief sought in a

**FEDERAL COAL MINE HEALTH  
AND SAFETY ACT OF 1969—Con.  
MODIFICATION OF APPLICATION OF  
MANDATORY SAFETY STANDARDS—  
Continued**

**Generally—Con:**

Petition for Modification  
of the application of a  
mandatory safety stand-  
ard. 30 U.S.C. § 861(c)  
(1970)-----

Page

406

**Automatic Couplers**

1. Where the evidence of record shows that a link aligner may not always be immediately available, as opposed to the ever-present automatic coupler, presenting an opportunity for a miner to position himself between mine cars to perform a coupling, a Petition for Modification to permit the use of link aligners must be denied as not providing the same degree of safety as automatic couplers in all respects and at all times-----
2. Where the proponent of a Petition for Modification of the application of 30 CFR 75.1405 is unable to rebut evidence produced by MESA based upon measurements and calculations showing automatic couplers to be suitable for use in the subject mine with no diminution of safety to the miners, the Petition will be denied-----

325

325

**Roof Control Plans**

1. The application of particular provisions of a roof control plan is subject to modification under sec. 301(c) of the Act. 30 U.S.C. § 861(c) (1970)---

108

**FEDERAL COAL MINE HEALTH  
AND SAFETY ACT OF 1969—Con.  
NOTICES OF VIOLATION**

**Abatement**

Page

1. Respirable dust samples required to be taken pursuant to 30 CFR 70.250 may be taken during any shift so long as the miner whose work atmosphere is being sampled is employed in his usual occupation-----

584

**Party to be Charged**

1. Where the miners employed by an operator of a coal mine are exposed to a safety hazard created by the lack of required back-up alarms on delivery trucks owned by a seller of coal and where the operator is in a realistic position to prevent or abate the violation with a minimum of due diligence, such operator is a proper party to be charged with the violation. 30 CFR 77.410---

77

**Reasonableness of Time**

1. In a review proceeding, an Administrative Law Judge abuses his discretion under sec. 105(b) by vacating a notice of violation on the ground that the time originally fixed therein is unreasonably short because such action is inconsistent with the Secretary's statutory obligation under sec. 109 to assess a civil penalty for every violation of the mandatory health or safety standards, 30 U.S.C. § 815(b) (1970)-----
2. Where a pattern of granting extensions of time is established to permit step-by-step accomplish-

335

# FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969—Con.

## NOTICES OF VIOLATION—Continued

### Reasonableness of Time—Continued

ment of an approved noise-control plan, and additional extension of time granted in conformance with such pattern will not be held by the Board to be unreasonable.-----

Page

704

### Sufficiency

1. Where a notice of violation does not clearly indicate which of two possible standards is alleged to be violated and an inspector's testimony supports neither the written description nor the section of the regulations cited, such notice is properly vacated.-----

515

## PENALTIES

### Admissibility of Previous Violations

1. A violation for which a penalty is paid by an operator which is less than the amount originally assessed by MESA is admissible as evidence in considering an operator's history of previous violations. 30 U.S.C. § 819(a)(1) (1970)-----

245

### Amounts

1. An obvious roof control violation which could have been discovered and abated by the operator, and which results in a roof fall injuring a miner, warrants a sizable penalty appropriate to the circumstances and commensurate with the deterrent intent of the Act.-----

264

# FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969—Con.

## PENALTIES—Continued

### Amounts—Continued

Page

2. Inasmuch as sec. 109 of the Act mandates the assessment of a civil penalty where a violation has been found to exist, it is error to assess a zero penalty in such circumstances because a zero penalty is no penalty. 30 U.S.C. § 819(a) (1970)-----

526

### Existence of Violation

#### Evidence

1. A fact may be inferred from circumstantial evidence, and such fact may be the basis of further inference leading to the ultimate or sought for fact.-----
2. Where an inspector describes a condition alleging that a violation occurred during the working shift immediately preceding the shift in which the inspection is made, a prima facie case that the violation occurred during the preceding shift may be made out by means of an inference drawn from facts established by direct evidence, provided that such inference is more probable than any other inference which can be drawn from such facts.-----

399

399

## RESPIRATORY DUST PROGRAM

### Generally

1. A notice of violation of 30 CFR 70.100(a) must be vacated where an operator overcomes MESA's prima facie case by establishing as an affirmative defense by a preponder-

**FEDERAL COAL MINE HEALTH  
AND SAFETY ACT OF 1969—Con.  
RESPIRATORY DUST PROGRAM—Con.  
Generally—Continued**

Page

ance of the evidence that  
it was cited for concen-  
trations of dust which  
are not wholly "respira-  
ble" within the meaning  
of the Act and regula-  
tions. 30 U.S.C. § 878(k)  
(1970) and 30 CFR  
70.2(i) -----

425

2. Coal dust particulates in  
excess of 5 microns in  
size are not "respirable  
dust" as a matter of law  
under 30 U.S.C. § 878(k)  
(1970) and 30 CFR  
70.2(i) -----

695

**REVIEW OF NOTICES AND ORDERS  
Generally**

1. The validity of the precedent  
notice and order is not  
in issue in a proceeding  
for review of an Order of  
Withdrawal issued pur-  
suant to sec. 104(c)(2)  
of the Act unless applica-  
tions for review are filed  
within 30 days of the  
issuance of the precedent  
notice and order (43 CFR  
4.530(c)) -----

232

**Dismissal of Applications**

1. A representative of miners  
has a statutory and regu-  
latory right to review of  
a notice of termination  
containing a finding of  
abatement as an inci-  
dent to a timely filed  
application for review of  
a previous sec. 104(b)  
notice of violation in  
which such representa-  
tive contends that such  
notice fixed a time for  
abatement that was un-  
reasonable. 30 U.S.C.  
§ 815 (1970), 43 CFR 4.1,  
4.500, 4.530, 4.533 -----

236

**FEDERAL COAL MINE HEALTH  
AND SAFETY ACT OF 1969—Con.  
REVIEW OF NOTICES AND ORDERS—  
Continued**

**Dismissal of Applications—  
Continued**

Page

2. An application for review of  
an original or modified  
sec. 104(b) notice of  
violation filed by a  
representative of miners  
does not become moot  
merely because MESA  
issues a notice of termi-  
nation containing a find-  
of abatement. 30 U.S.C.  
§ 815 (1970) -----

236

**SECRETARIAL ORDERS  
Generally**

1. An order signed by the  
Secretary which estab-  
lishes enforcement policy  
is binding throughout the  
Department, and its va-  
lidity is neither proce-  
durally nor substantively  
subject to challenge at  
the administrative level.

409

**UNAVAILABILITY OF EQUIPMENT,  
MATERIALS, OR QUALIFIED TECHNI-  
CIANS**

**Pleading and Proof**

1. When a notice of violation  
or order of withdrawal is  
issued for failure to com-  
ply with a mandatory  
health or safety standard,  
there is a rebuttable  
presumption that re-  
quired equipment, ma-  
terials, and qualified  
technicians are available  
to the operator. 30 U.S.C.  
§ 819(a)(1) -----
2. In a penalty proceeding in-  
volving an alleged failure  
to provide a methane mon-  
itor, the defense of unavail-  
ability of equipment is an  
affirmative defense which,  
to be sustained, must be  
pleaded and proved by the  
operator. 30 U.S.C. § 819  
(a)(1); 43 CFR 4.542.-----

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92

**FEDERAL COAL MINE HEALTH  
AND SAFETY ACT OF 1969—Con.  
UNWARRANTABLE FAILURE**

**Notices of Violation**

1. A violation of a mandatory standard is not "of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard" if it poses either a purely technical instance of non-compliance or a source of any injury which has only a remote or speculative chance of coming to fruition. 30 U.S.C. § 814(c)(1) (1970)----- 574
2. A notice of violation may be issued under sec. 104(c)-(1) without regard for the seriousness or gravity of the injury likely to result from the hazard posed by the violation, that is, an inspector need not find a risk of serious bodily harm, let alone of death. 30 U.S.C. § 814(c)(1) (1970)----- 574

**VALIDITY OF REGULATIONS**

1. The Board, as delegate of the Secretary, has not been empowered to entertain a challenge to the validity of regulations promulgated by the Secretary pursuant to sec. 508 of the Federal Coal Mine Health and Safety Act of 1969. 30 U.S.C. § 957 (1970); 43 CFR 4.1----- 87

**WITHDRAWAL ORDERS**

**Generally**

1. A sec. 104(c)(2) withdrawal order is properly issued where it is shown that such order is based on a violation of a mandatory

**FEDERAL COAL MINE HEALTH  
AND SAFETY ACT OF 1969—Con.  
WITHDRAWAL ORDERS—Continued**

**Generally—Continued**

Page

health or safety standard which is caused by the operator's unwarrantable failure to comply and no consideration need be given to whether the violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. 30 U.S.C. § 814(c)(2)----- 232, 260, 262

**Failure to Abate**

1. Where an inspector finds that a violation has not been abated within the time fixed for abatement, his authority under sec. 104(b) of the Act to issue either an extension of time or an order of withdrawal must be exercised reasonably based on the facts confronting him at the time. 30 U.S.C. § 814(b) (1970)----- 584

**Imminent Danger**

1. Accumulations of loose coal, coal dust, and oil and grease together with sources of potential ignition will support a finding of imminent danger.----- 204
2. A sec. 104(a) withdrawal order must be based on an imminent danger existing at the time of issuance of such order and cannot properly be based on a danger which is speculative, has subsided, or has been abated. 30 U.S.C. §§ 801(j) and 814 (a)----- 294

**FEDERAL EMPLOYEES AND OFFICERS****AUTHORITY TO BIND GOVERNMENT**

1. Unauthorized acts by an employee of the Bureau of Indian Affairs cannot serve as the basis for conferring rights not authorized by law. Moreover, neither the Secretary of the Interior nor the Department is bound or estopped by such unauthorized acts.-----

227

**FEDERAL METAL AND NONMETALLIC MINE SAFETY ACT****IMMINENT DANGER WITHDRAWAL ORDERS****Dismissal**

1. Allegations of invalidity ab initio with respect to an imminent danger withdrawal order constitute a legally sufficient claim for relief under secs. 9 and 11 of the Act. 30 U.S.C. §§ 728, 730 (1970).-----

329

**Mootness**

1. Abatement of a condition or practice which gave rise to a sec. 8(a) imminent danger withdrawal order does not render moot an application for review and annulment of such order under secs. 9 and 11 of the Act. 30 U.S.C. §§ 727 (a), 728, 730 (1970).-----

329

**GRAZING LEASES****GENERALLY**

1. The regulations do not provide for hearings as a matter of right on trespass violations involving a section 15 grazing lessee. For the Board of Land Appeals to exercise its discretion under 43 CFR 4.415 and order a hearing, the appellant must allege facts which, if proved, would entitle him to the relief sought...

269

**GRAZING LEASES—Continued****CANCELLATION OR REDUCTION**

Page

1. When the holder of a grazing lease is found to have violated regulations and the terms of his lease because his cattle have trespassed on Federal land, his lease may be canceled when lesser sanctions have proved to be of no effect or when the nature of the violation demands such severity. However, a decision canceling a lease will be set aside where the District Manager relied upon alleged trespasses of which the lessees had no notice and which occurred after a show cause notice had issued, and the case will be remanded for further proceedings.-----

269

**GRAZING PERMITS AND LICENSES****GENERALLY**

1. The term "grazing trespass" as used in the context of the Federal Range Code refers to the grazing of livestock on federal land without an appropriate license or permit or in violation of the terms and conditions of a license or permit, and not to any other special meaning ascribed under other laws and circumstances if inconsistent with this usage.-----
2. Although a respondent in a grazing license trespass hearing brought by the Bureau of Land Management has the right to be represented and aided by legal counsel, the Department has no duty or responsibility under the

185

# GRAZING PERMITS AND LICENSES—Continued

GENERALLY—Continued	Page
Constitution or the Administrative Procedure Act to provide such counsel for him-----	185
3. Where a permittee was found to have committed repeated grazing trespasses, a fine of twice the commercial rate for foraging such animals was warranted in accordance with the regulations-----	185
4. Where a grazing trespass is willful, grossly negligent, or repeated, disciplinary action in the form of suspension, reduction, or revocation, or denial of renewal of a grazing license or permit may be warranted. The regulatory factors, together with any mitigating circumstances, should be considered to determine the extent of the reduction or other disciplinary action-----	185
5. Where the record of a grazing trespass case does not support a finding of mitigating or extenuating circumstances which would warrant changing a 20 percent reduction of a grazing permittee's active use qualifications for two grazing seasons, an Administrative Law Judge's order of such a reduction will be upheld-----	186
6. A grazing permittee under sec. 3 of the Taylor Grazing Act does not have an absolute right to a permit renewal even though denial thereof will impair the value of his grazing unit which is pledged as security for a bona fide loan. The Department	

# GRAZING PERMITS AND LICENSES—Continued

GENERALLY—Continued	Page
may refuse to renew such a permit when the public interest requires that the subject land be preserved from unnecessary injury, exchanged, disposed of, or reclassified for alternate public use. Similarly, if the Department may deny renewal outright under the above circumstances, the Department may renew such a permit for a lesser term than previously allowed pending completion of a Management Framework Plan and an Allotment Management Plan which are oriented not only to livestock grazing, but also to multiple use management which includes such concerns as land and water conservation, environmental protection, and other resource management objectives which can be achieved by reclassification of national resource lands and manipulation of grazing activity-----	543
7. "Such permit" as used in sec. 3 of the Taylor Grazing Act, 43 U.S.C. § 315b (1970), providing for a renewal of a grazing permit does not mean only a permit identical with the terms and provisions of the original-----	543
8. Where by final judgment a court has ordered that until an appropriate environmental impact statement is issued the BLM will issue authorization for livestock grazing only	

**GRAZING PERMITS AND  
LICENSES—Continued**

**GENERALLY—Continued**

on an annual basis, a  
grazing permit can be re-  
newed for only one year,  
even though the grazing  
unit has been pledged as  
security for a bona fide  
loan.....

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543

**CANCELLATION OR REDUCTION**

1. Where a grazing trespass is  
willful, grossly negligent,  
or repeated, disciplinary  
action in the form of  
suspension, reduction, or  
revocation, or denial of  
renewal of a grazing li-  
cense or permit may be  
warranted. The regula-  
tory factors, together  
with any mitigating cir-  
cumstances, should be  
considered to determine  
the extent of the reduc-  
tion or other disciplinary  
action.....

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2. Where the record of a grazing  
trespass case does not  
support a finding of miti-  
gating or extenuating cir-  
cumstances which would  
warrant changing a 20  
percent reduction of a  
grazing permittee's active  
use qualifications for two  
grazing seasons, an Ad-  
ministrative Law Judge's  
order of such a reduction  
will be upheld.....

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3. A grazing permittee under  
sec. 3 of the Taylor  
Grazing Act does not  
have an absolute right  
to a permit renewal even  
though denial thereof will  
impair the value of his  
grazing unit which is  
pledged as security for a  
bona fide loan. The De-  
partment may refuse to  
renew such a permit when  
the public interest re-

**GRAZING PERMITS AND  
LICENSES—Continued**

**CANCELLATION OR REDUCTION—Con.**

Page

quires that the subject  
land be preserved from  
unnecessary injury, ex-  
changed, disposed of, or  
reclassified for alternate  
public use. Similarly, if  
the Department may  
deny renewal outright  
under the above circum-  
stances, the Department  
may renew such a permit  
for a lesser term than  
previously allowed pend-  
ing completion of a Man-  
agement Framework Plan  
and an Allotment Man-  
agement Plan which are  
oriented not only to live-  
stock grazing, but also to  
multiple use management  
which includes such con-  
cerns as land and water  
conservation, environ-  
mental protection, and  
other resource manage-  
ment objectives which  
can be achieved by reclas-  
sification of national re-  
source lands and manip-  
ulation of grazing  
activity.....

543

**TRESPASS**

1. The term "grazing trespass"  
as used in the context of  
the Federal Range Code  
refers to the grazing of  
livestock on federal land  
without an appropriate  
license or permit or in  
violation of the terms and  
conditions of a license or  
permit, and not to any  
other special meaning as-  
cribed under other laws  
and circumstances if in-  
consistent with this  
usage.....

185

2. Where a permittee was found  
to have committed re-  
peated grazing trespasses,

# **GRAZING PERMITS AND LICENSES—Continued**

## **TRESPASS—Continued**

- |  |     |
|--|-----|
| a fine of twice the commercial rate for foraging such animals was warranted in accordance with the regulations-----  | 185 |
| 3. Where a grazing trespass is willful, grossly negligent, or repeated, disciplinary action in the form of suspension, reduction, or revocation, or denial of renewal of a grazing license or permit may be warranted. The regulatory factors, together with any mitigating circumstances, should be considered to determine the extent of the reduction or other disciplinary action-----       | 185 |
| 4. In determining whether grazing trespasses are "willful," intent sufficient to establish willfulness may be shown by proof of facts which objectively show that the circumstances do not comport with the notion that the trespasser acted in good faith or innocent mistake, or that his conduct was so lacking in reasonableness or responsibility that it became reckless or negligent----- | 185 |
| 5. Where the record of a grazing trespass case does not support a finding of mitigating or extenuating circumstances which would warrant changing a 20 percent reduction of a grazing permittee's active use qualifications for two grazing seasons, an Administrative Law Judge's order of such a reduction will be upheld-----   | 186 |

## **HEARINGS**

(See also Administrative Procedure, Federal Coal Mine Health and Safety Act of 1969; Federal Metal and Nonmetallic Mine Safety Act, Grazing Permits and Licenses, Indian Probate, Mining Claims, Rules of Practice.)

- |  |     |
|--|-----|
| 1. Where the Bureau of Land Management determines that an Alaska Native allotment application should be rejected because the land was not used and occupied by the applicant, the BLM shall issue a contest complaint pursuant to 43 CFR 4.451 <i>et seq.</i> Upon receiving a timely answer to the complaint, which answer raises a disputed issue of material fact, the Bureau will forward the case file to the Hearings Division, Office of Hearings and Appeals, Department of the Interior, for assignment of an Administrative Law Judge, who will proceed to schedule a hearing at which the applicant may produce evidence to establish entitlement to his allotment----- | 309 |
| 2. Under 43 U.S.C. § 961 (1970) and 43 CFR 2802.1-7(a), an applicant has no right to a hearing in connection with original charges for use and occupancy of a communication site, and a hearing pursuant to a request under 43 CFR 4.415 will not be granted where applicant fails to make specific allegations or offer specific proof to show in what factors a Departmental appraisal is in error-----  | 332 |

## INDIAN LANDS

(See also Indian Probate.)

## CONTRACTS

## Formation and Validity

## Bids and Awards

## Mistakes

Page

1. Where the Bureau of Indian Affairs knew or should have known of the bidder's mistake, a bidder on Indian lands is entitled to recover deposits where he is guilty of mistake in misreading of specification----- 603

## LEASES AND PERMITS

## Generally

1. Leases may be granted by the Secretary pursuant to 25 CFR 131.2(a)(4) only where adult owners who qualify under 25 CFR 131.3 are unable to agree upon a lease----- 21

## RESERVATION BOUNDARY

1. Where an Indian tribe acquired title to land under treaty, an erroneous survey of a boundary which became the boundary of an adjacent wilderness area, could be administratively corrected and control would be restored to the tribe under 16 U.S.C. § 473 (1970)----- 529

## TRESPASS

## Damages

1. Notice and demand for collection of damages for trespass on Indian lands are prerequisites to filing suit in federal district court to collect damages for trespass and is not subject to appeal under 25 CFR Part 2----- 561

## INDIAN LANDS—Continued

## TRIBAL RIGHTS IN ALLOTTED LANDS

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1. Absent regulations requiring otherwise the most equitable valuation date would be the date the Tribe elects to purchase the property of a non-eligible heir or devisee--- 209
2. The Board is not bound by the Bureau of Indian Affairs' appraisal, report and findings contained therein. Instead, the Board will give consideration to the complete record, including the BIA appraisal, report and findings in arriving at its findings and determination----- 209
3. Absent controlling guidelines in the statute concerning valuation date (fair market value), it is more equitable to charge the Yakima Tribe the fair market value of the property as of the date the Tribe elected to purchase same, i.e., Jan. 25, 1974.. 216

## INDIAN PROBATE

(See also Indian Lands, Indian Tribes.)

## HALF BLOOD

## 250.0 Generally

1. State statutes of descent and distribution as construed and interpreted by the highest court of the state involved will be considered by the Department as controlling in trust heirship proceedings----- 75

## INDIAN REORGANIZATION ACT OF JUNE 18, 1934

## 270.0 Generally

1. The Indian Reorganization Act recognizes two classes of persons who may take

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**INDIAN REORGANIZATION ACT OF**  
**JUNE 18, 1934—Continued**

**270.0 Generally—Continued** Page

testator's lands by devise,  
 that is, any member of  
 the tribe having juris-  
 diction over such lands  
 and legal heirs of the  
 testator----- 170

**270.1 Construction of Section**  
**4**

1. The words "or any heirs of  
 such member" found in  
 sec. 4 (25 U.S.C. § 464  
 (1970)) were early con-  
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 to mean those who would,  
 in absence of the will,  
 have been entitled to  
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**375.0 Generally**

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 Indian agency is a proper  
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 Indian Affairs to file a  
 petition for reopening under  
 the authority of 43  
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 has no interest in the out-  
 come of such petition--- 362
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 sented for probate even  
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 for the Secretary of the  
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**INDIAN PROBATE—Continued**  
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**415.0 Generally**

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1. Where trust patents for allot-  
 ments for lands were  
 issued in conformity with  
 the General Allotment  
 Act and contained usual  
 provision that the United  
 States would hold lands  
 subject to statutory pro-  
 visions and restrictions  
 for a period of years, in  
 trust for the sole use and  
 benefit of Indians, and  
 lands were chiefly valu-  
 able for their timber, the  
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1. It is incumbent upon the  
 Administrative Law  
 Judge under existing reg-  
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 to construe the provisions  
 of a will----- 229

**425.11 Disapproval of Will**

1. Regardless of scope of Ad-  
 ministrative Law Judge's  
 authority to grant or  
 withhold approval of the  
 will of an Indian under  
 statute, there is not vested  
 in the Judge power to  
 revoke a will which re-  
 flects a rational testa-  
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**INDIAN PROBATE—Continued****WILLS—Continued****425.17 Lost Will**

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**YAKIMA TRIBES****435.0 Generally**

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|---|-----|
| 1. Absent regulations requiring otherwise the most equitable valuation date would be the date the Tribe elects to purchase the property of a non-eligible heir or devisee---  | 209 |
| 2. Absent controlling guidelines in the statute concerning valuation date (fair market value), it is more equitable to charge the Yakima Tribe the fair market value of the property as of the date the Tribe elected to purchase same, i.e., Jan. 25, 1974.----- | 216 |

**435.1 Valuation Reports**

- |   |     |
|---|-----|
| 1. The Board is not bound by the Bureau of Indian Affairs' appraisal, report and findings contained therein. Instead, the Board will give consideration to the complete record, including the BIA appraisal, report and findings in arriving at its findings and determination----- | 209 |
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**INDIAN TRIBES**

(See also Indian Probate.)

**CONSTITUTION BYLAWS AND ORDINANCES**

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**INDIAN TRIBES—Continued****TRIBAL AUTHORITY**

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| 1. Acts of Tribal Chairmen done in contravention of their respective Tribal Constitutions and Bylaws are void from their inception and not binding upon their respective Tribes-- | 227 |
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**INDIAN WATER AND POWER RESOURCES****GENERALLY**

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| 1. Sec. 5(b) of the Act of May 25, 1948 (62 Stat. 269) is not applicable to those tribal lands upon which the Flathead Irrigation Project's Kerr Substation and Switchyard are located-- | 346 |
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**MILLSITES**

(See also Mining Claims.)

**GENERALLY**

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|--|-----|
| 1. Mining claims and millsites located upon land which has been previously withdrawn from entry under the mining laws by a first-form reclamation withdrawal are void ab initio. Because Departmental Order No. 2515 delegated authority to revoke such a withdrawal to the Bureau of Reclamation with the concurrence of the Bureau of Land Management, the land remains withdrawn from mining locations when the Bureau of Land Management does not concur with the recommendation of the Bureau of Reclamation to revoke the withdrawal and restore the land to entry-- | 275 |
|--|-----|

**MINERAL LANDS****GENERALLY**

1. Lands known to be mineral in character (except for coal or iron) at the time of definite location of a railroad are excluded from the grant of place lands to the railroad even though the lands may later lose their mineral character-----

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1

**DETERMINATION OF CHARACTER OF**

1. The period for determination by the Department of the Interior whether public land included within the primary limits of a legislative grant-in-aid of the construction of a railroad which excepts mineral land is mineral in character extends to the time of issuance of patent to the railroad company-----
2. When the Department of the Interior finds that public land within the place limits of a legislative grant-in-aid of the construction of a railroad was mineral in character and the railroad company challenges such finding a hearing should be granted at which the Department has the obligation of making a prima facie case of mineral character, whereupon the company has the burden of establishing nonmineral character by a preponderance of the evidence-----

1

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**MINING CLAIMS****GENERALLY**

1. Fire is not a mineral which is locatable under the general mining law-----
2. The bottling and distribution for sale of spring water for human consumption

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**MINING CLAIMS—Continued****GENERALLY—Continued**

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- does not constitute the mining of a valuable mineral deposit under the general mining law-----
3. When title to an entire in-place school section has passed to the state, the United States no longer has a property interest therein and the land is no longer subject to location under the mining laws----

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275

**COMMON VARIETIES OF MINERALS****Generally**

1. In order to establish that a type of stone material is not a common variety under the Act of July 23, 1955, a mining claimant must demonstrate that: (1) the mineral deposit has a unique property, and (2) the unique property gives the deposit a distinct and special value. Where evidence establishes that geodes in a particular deposit have unique properties distinguishable from other types of stones which give the deposit of geodes a distinct and special value, the fact that the geodes may be similar to geodes from other areas which have similar properties and values is not sufficient evidence to establish that the deposit of geodes is a common variety of stone within the meaning of the Act of July 23, 1955-----

609

**CONTESTS**

1. In a mining contest, a matter not charged in the complaint may only be considered by the Administrative Law Judge if it

## MINING CLAIMS—Continued

## CONTESTS—Continued

was raised at the hearing without objection and the contestee was fully aware that the issue was raised.

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## HEARING

1. A request for a hearing pursuant to 43 CFR 4.415 for the purpose of taking testimony on the Bureau of Land Management's "continued refusal" to restore land in a reclamation withdrawal to entry will be denied. An appeal from a decision declaring mining claims and millsites null and void ab initio because the lands are in the withdrawal may not serve as the vehicle for petitioning the Secretary of the Interior to revoke the withdrawal. Furthermore, even if the withdrawal were revoked and the lands opened to entry, this action could not revive mining claims which were void when located while the withdrawal was in effect and the land closed to entry under the mining laws.

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## LANDS SUBJECT TO

1. When title to an entire in-place school section has passed to the state, the United States no longer has a property interest therein and the land is no longer subject to location under the mining laws.
2. A request for a hearing pursuant to 43 CFR 4.415 for the purpose of taking testimony on the Bureau of Land Management's "continued refusal" to restore land in a

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## MINING CLAIMS—Continued

## LANDS SUBJECT TO—Continued

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reclamation withdrawal to entry will be denied. An appeal from a decision declaring mining claims and millsites null and void ab initio because the lands are in the withdrawal may not serve as the vehicle for petitioning the Secretary of the Interior to revoke the withdrawal. Furthermore, even if the withdrawal were revoked and the lands opened to entry, this action could not revive mining claims which were void when located while the withdrawal was in effect and the land closed to entry under the mining laws.

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## LOCATABILITY OF MINERAL

## Generally

1. Water is not a mineral which is locatable under the general mining law.
2. A valuable deposit of geodes, round stones with crystalline centers and composed of recognized mineral substances, which possess an economic value in trade and the ornamental arts, and which are being removed by actual mining operations, is subject to location under the mining laws. *South Dakota Mining Co. v. McDonald*, 30 L.D. 357 (1900), distinguished.

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## SPECIFIC MINERAL INVOLVED

## Generally

1. A valuable deposit of geodes, round stones with crystalline centers and composed of recognized mineral substances, which possess an economic value in

**MINING CLAIMS—Continued**  
**SPECIFIC MINERAL INVOLVED—Con.**

**Generally—Continued**

trade and the ornamental arts, and which are being removed by actual mining operations, is subject to location under the mining laws. *South Dakota Mining Co. v. McDonald*, 30 L.D. 357 (1900), distinguished-----

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**Water**

1. Water is not a mineral which is locatable under the general mining law-----

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**WITHDRAWN LAND**

1. Mining claims located on land withdrawn from all forms of entry are null and void from the beginning-----

249

2. Mining claims and millsites located upon land which has been previously withdrawn from entry under the mining laws by a first-form reclamation withdrawal are void ab initio. Because Departmental Order No. 2515 delegated authority to revoke such a withdrawal to the Bureau of Reclamation with the concurrence of the Bureau of Land Management, the land remains withdrawn from mining locations when the Bureau of Land Management does not concur with the recommendation of the Bureau of Reclamation to revoke the withdrawal and restore the land to entry-----

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3. A request for a hearing pursuant to 43 CFR 4.415 for the purpose of taking testimony on the Bureau of Land Management's "continued refusal" to restore land in a reclama-

**MINING CLAIMS—Continued**  
**WITHDRAWN LAND—Continued**

tion withdrawal to entry will be denied. An appeal from a decision declaring mining claims and millsites null and void ab initio because the lands are in the withdrawal may not serve as the vehicle for petitioning the Secretary of the Interior to revoke the withdrawal. Furthermore, even if the withdrawal were revoked and the lands opened to entry, this action could not revive mining claims which were void when located while the withdrawal was in effect and the land closed to entry under the mining laws--

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**NATIONAL ENVIRONMENTAL  
 POLICY ACT OF 1969**

**ENVIRONMENTAL STATEMENTS**

1. Where by final judgment a court has ordered that until an appropriate environmental impact statement is issued the BLM will issue authorization for livestock grazing only on an annual basis, a grazing permit can be renewed for only one year, even though the grazing unit has been pledged as security for a bona fide loan-----

543

**NAVIGABLE WATERS**

1. The States possess dominion over the beds of all navigable streams within their borders-----
2. An oil and gas offer embracing land in the bed of a navigable river, which is State land, is properly rejected-----

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**NOTICE**

**GENERALLY**

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1. When the holder of a grazing lease is found to have violated regulations and the terms of his lease because his cattle have trespassed on Federal land, his lease may be canceled when lesser sanctions have proved to be of no effect or when the nature of the violation demands such severity. However, a decision canceling a lease will be set aside where the District Manager relied upon alleged trespasses of which the lessees had no notice and which occurred after a show cause notice had issued, and the case will be remanded for further proceedings-----

269

2. Where it does not appear that the notice required by sec. 7(b) of the Privacy Act of 1974 regarding the disclosure of a social security number was given, an oil and gas lease offer on a drawing card filed in a simultaneous drawing procedure should not be considered defective solely because the applicant omitted designating the social security number on the the card as provided thereon-----

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**OIL AND GAS LEASES**

**GENERALLY**

1. The recommendations of the Forest Service are important in determining whether or not an oil and gas lease should issue for public lands but are not conclusive. Ultimately, the Secretary of the Inte-

**OIL AND GAS LEASES—Continued**

**GENERALLY—Continued**

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rior is entrusted with the responsibility of determining whether or not to issue a lease-----

33

**ACREAGE LIMITATIONS**

1. An oil and gas lease issued for 2,960 acres in violation of administrative regulations need not be canceled in its entirety, in the absence of an intervening qualified applicant-----

247

**APPLICATIONS**

**Generally**

1. An oil and gas lease offer on a drawing card filed in a simultaneous drawing procedure is properly rejected as defective where there are other parties in interest in addition to the applicant but the card does not list them or refer to an attachment, and an attachment dated nearly 6 months prior to the filing, signed by the applicant and four others stating their qualifications and setting forth a percentage of interest for each as "Partners in interest," fails adequately to set forth the nature of their agreement, and no other statement or information is filed within the time required by 43 CFR 3102.7-----

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2. The signature of the offeror on a simultaneous oil and gas lease entry card may be affixed by means of a rubber stamp, if it is the intention of the offeror that it be his or her signature-----

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3. The term "signed and fully executed" as used in 43

## OIL AND GAS LEASES—Continued

## APPLICATIONS—Continued

## Generally—Continued

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CFR 3112.2-1(a) does not interdict the use of a rubber stamp or other mechanical device to affix a signature to a drawing entry card, provided that it is the applicant's intention that the facsimile be his signature....

538

4. Where a facsimile affixed by means of a rubber stamp or other mechanical device constitutes an applicant's signature on a drawing entry card lease offer, a State Office of the Bureau of Land Management need not presume that the applicant, rather than an agent, stamped the card. It is proper for the BLM office to make inquiry into the filing to establish that the applicant's signature was affixed at his request and that he formulated the offer. If it is disclosed that the signature was affixed pursuant to a power of attorney, and the offer was not accompanied by the statements required by 43 CFR 3102.6-1, the offer must be rejected.....

538

5. Under 30 U.S.C. § 226 (1970), the Department has no authority to issue a non-competitive oil and gas lease to anyone other than the first qualified applicant. If a drawing entry card lease offer is signed by an agent or attorney-in-fact in behalf of the applicant, or if a facsimile signature of the applicant is affixed upon

## OIL AND GAS LEASES—Continued

## APPLICATIONS—Continued

## Generally—Continued

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the offer by an agent or attorney-in-fact, the offer cannot be considered to have been submitted by a qualified applicant unless it is accompanied by the statements required by 43 CFR 3102.6-1.....

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## Attorneys-in-Fact or Agents

1. Where a rubber stamp constitutes an offeror's signature on a simultaneous oil and gas lease entry card, the Bureau of Land Management need not presume that the offeror rather than an agent stamped the card, and where no agent's statement has been submitted, BLM may take appropriate action to establish the circumstances under which the signature was stamped on the card.....

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2. "Agent." The word "agent," as used in 43 CFR 3102.6-1 requiring statements of authority and disclosure of interests in oil and gas lease offers by agents, does not include an employee who has no discretionary authority and merely acts as the employer's amanuensis in affixing the employer's stamp on a simultaneous oil and gas lease offer entry card, even if it is done outside the actual physical presence of the employer. Any statement required by the Bureau of Land Management to establish the identity of the person who stamped the offeror's name on the card must allow the of-

**OIL AND GAS LEASES—Continued**  
**APPLICATIONS—Continued**

**Attorneys-in-Fact or**  
**Agents—Continued**

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feror to provide information to establish whether or not the person was an agent within the meaning of 43 CFR 3102.6-1; merely requiring the offeror to show the stamp was affixed by him or in his presence is not sufficient-----

533

3. Where a facsimile affixed by means of a rubber stamp or other mechanical device constitutes an applicant's signature on a drawing entry card lease offer, a State Office of the Bureau of Land Management need not presume that the applicant, rather than an agent, stamped the card. It is proper for the BLM office to make inquiry into the filing to establish that the applicant's signature was affixed at his request and that he formulated the offer. If it is disclosed that the signature was affixed pursuant to a power of attorney, and the offer was not accompanied by the statements required by 43 CFR 3102.6-1, the offer must be rejected-----

538

4. Under 30 U.S.C. § 226 (1970), the Department has no authority to issue a noncompetitive oil and gas lease to anyone other than the first qualified applicant. If a drawing entry card lease offer is signed by an agent or attorney-in-fact in behalf of the applicant, or if a

**OIL AND GAS LEASES—Continued**  
**APPLICATIONS—Continued**

**Attorneys-in-Fact or**  
**Agents—Continued**

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facsimile signature of the applicant is affixed upon the offer by an agent or attorney-in-fact, the offer cannot be considered to have been submitted by a qualified applicant unless it is accompanied by the statements required by 43 CFR 3102.6-1----

538

**Drawings**

1. Where it does not appear that the notice required by sec. 7(b) of the Privacy Act of 1974 regarding the disclosure of a social security number was given, an oil and gas lease offer on a drawing card filed in a simultaneous drawing procedure should not be considered defective solely because the applicant omitted designating the social security number on the card as provided thereon-----

507

2. An oil and gas lease offer on a drawing card filed on a simultaneous drawing procedure is properly rejected as defective where there are other parties in interest in addition to the applicant but the card does not list them or refer to an attachment, and an attachment dated nearly 6 months prior to the filing, signed by the applicant and four others stating their qualifications and setting forth a percentage of interest for each as "Partners in interest," fails adequately to set forth the nature of their agreement, and no

## OIL AND GAS LEASES—Con.

## APPLICATIONS—Continued

## Drawings—Continued

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- other statement or information is filed within the time required by 43 CFR 3102.7..... 507
3. Where a rubber stamp constitutes an offeror's signature on a simultaneous oil and gas lease entry card, the Bureau of Land Management need not presume that the offeror rather than an agent stamped the card, and where no agent's statement has been submitted, BLM may take appropriate action to establish the circumstances under which the signature was stamped on the card..... 533
4. "Agent." The word "agent," as used in 43 CFR 3102.6-1 requiring statements of authority and disclosure of interests in oil and gas lease offers by agents, does not include an employee who has no discretionary authority and merely acts as the employer's amanuensis in affixing the employer's stamp on a simultaneous oil and gas lease offer entry card, even if it is done outside the actual physical presence of the employer. Any statement required by the Bureau of Land Management to establish the identity of the person who stamped the offeror's name on the card must allow the offeror to provide information to establish whether or not the person was an agent within the meaning of 43 CFR

## OIL AND GAS LEASES—Con.

## APPLICATIONS—Continued

## Drawings—Continued

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- 3102.6-1; merely requiring the offeror to show the stamp was affixed by him or in his presence is not sufficient..... 533
5. The term "signed and fully executed" as used in 43 CFR 3112.2-1(a) does not interdict the use of a rubber stamp or other mechanical device to affix a signature to a drawing entry card, provided that it is the applicant's intention that the facsimile be his signature..... 538
6. Under 30 U.S.C. § 226 (1970), the Department has no authority to issue a non-competitive oil and gas lease to anyone other than the first qualified applicant. If a drawing entry card lease offer is signed by an agent or attorney-in-fact in behalf of the applicant, or if a facsimile signature of the applicant is affixed upon the offer by an agent or attorney-in-fact, the offer cannot be considered to have been submitted by a qualified applicant unless it is accompanied by the statements required by 43 CFR 3102.6-1..... 538
- Sole Party in Interest**
1. An oil and gas lease offer on a drawing card filed in a simultaneous drawing procedure is properly rejected as defective where there are other parties in interest in addition to the applicant but the card does not list them or refer to an attachment, and an attachment dated

**OIL AND GAS LEASES—Con.**

**APPLICATIONS—Continued**

**Sole Party in Interest—Con.**

nearly 6 months prior to the filing, signed by the applicant and four others stating their qualifications and setting forth a percentage of interest for each as "Partners in interest," fails adequately to set forth the nature of their agreement, and no other statement or information is filed within the time required by 43 CFR 3102.7-----

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**CANCELLATION**

1. It is improper to dismiss a protest against issuance of an oil and gas lease applied for pursuant to the Act of May 21, 1930, 30 U.S.C. § 301 *et seq.* (1970), for lands underlying a railroad right-of-way granted under the Act of Mar. 3, 1875, when the lands traversed by the right-of-way were later patented without a reservation for minerals. In such case title to the mineral estate underlying the right-of-way is no longer held by the United States and, therefore, a lease issued pursuant to the 1930 Act is void and must be canceled-----

195

2. An oil and gas lease issued for 2,960 acres in violation of administrative regulations need not be canceled in its entirety, in the absence of an intervening qualified applicant-----

247

**CONSENT OF AGENCY**

1. The recommendations of the Forest Service are important in determining

**OIL AND GAS LEASES—Con.**

**CONSENT OF AGENCY—Continued**

Page

whether or not an oil and gas lease should issue for public lands but are not conclusive. Ultimately, the Secretary of the Interior is entrusted with the responsibility of determining whether or not to issue a lease...

33

2. Where the Bureau of Land Management rejects an oil and gas lease offer for public lands within a national forest solely on the objection of the Forest Service and where the Bureau officials did not make an independent determination whether leasing the lands is or is not in the public interest, the rejection is not a proper exercise of discretion and the case will be remanded to the Bureau for further consideration-----

33

**DISCRETION TO LEASE**

1. In the absence of a withdrawal of land from mineral leasing, public lands are subject to leasing for oil and gas in the discretion of and under conditions imposed by the Secretary of the Interior-----
2. Where the Bureau of Land Management rejects an oil and gas lease offer for public lands within a national forest solely on the objection of the Forest Service and where the Bureau officials did not make an independent determination whether leasing the lands is or is not in the public interest,

33

## OIL AND GAS LEASES—Con.

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## Discretion to Lease—Continued

- the rejection is not a proper exercise of discretion and the case will be remanded to the Bureau for further consideration-----

33

## First Qualified Applicant

1. Where a rubber stamp constitutes an offeror's signature on a simultaneous oil and gas lease entry card, the Bureau of Land Management need not presume that the offeror rather than an agent stamped the card, and where no agent's statement has been submitted, BLM may take appropriate action to establish the circumstances under which the signature was stamped on the card----

533

## LANDS SUBJECT TO

1. Public lands in national forests are presently open to oil and gas leasing regardless of whether they are part of an officially designated wilderness area. However, where the land is within such an established wilderness area, the Secretary of Agriculture has the statutory authority to prescribe reasonable stipulations for the protection of the wilderness character of the land consistent with the use of the land for the purpose of the lease, although only the Secretary of the Interior may close the land to leasing or prohibit the issuance of a lease-----

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## OIL AND GAS LEASES—Con.

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## LANDS SUBJECT TO—Continued

2. An oil and gas offer embracing land in the bed of a navigable river, which is State land, is properly rejected-----

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## REINSTATEMENT

1. Under 30 U.S.C. § 188(c) (1970), the Secretary of the Interior has no authority to reinstate an oil and gas lease terminated by operation of law for failure to make timely payment of rental, unless the rental payment is tendered at the proper office within 20 days of the due date-----
2. Cashing of an oil and gas rental check, received more than 20 days after due, does not constitute a waiver which would permit reinstatement of a terminated lease in violation of 30 U.S.C. § 188(c) (1970), despite wording on the check that "by endorsement this check when paid is accepted in full payment \* \* \*"--

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## RIGHTS-OF-WAY LEASES

1. Where a protest against the United States entering into a compensatory royalty agreement pertaining to oil and gas underlying a railroad right-of-way pursuant to the Act of May 21, 1930, 46 Stat. 373, 30 U.S.C. § 301 *et seq.* (1970), is based upon an assertion that the protestants have title to the oil and gas under the right-of-way, the protest will be properly dismissed if it is found the United States has title to those minerals-----

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**OIL AND GAS LEASES—Con.**

**RIGHT-OF-WAY LEASES—Continued**

Page

2. Although the grants of a right-of-way to a railroad under sec. 2 of the Act of July 1, 1862, and of title to odd-numbered sections of land under section 3 of that Act were grants *in praesenti*, the railroad's interest in the right-of-way land stems solely from sec. 2. There is no difference in its interest in portions of the right-of-way land which cross even-numbered sections of land and in portions which cross odd-numbered sections. Minerals underlying the right-of-way were reserved to the United States in both instances.----- 80
3. Title to the oil and gas deposits underlying the right-of-way granted to a railroad by the Act of July 1, 1862, 12 Stat. 489, did not pass under a patent to the land that the right-of-way crosses. Rather, title remains in the United States----- 80
4. The Secretary of the Interior does not have authority under the Right-of-Way Oil and Gas Leasing Act of May 21, 1930, 30 U.S.C. § 301 *et seq.* (1970), to dispose of deposits of oil and gas underlying a railroad right-of-way granted pursuant to the Act of Mar. 3, 1875, when the lands traversed by the right-of-way were later patented under the Act of Apr. 24, 1820, without any reservation for minerals. In

**OIL AND GAS LEASES—Con.**

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- such case, title to the mineral estate was included within the grant to the patentee.----- 195
  5. It is improper to dismiss a protest against issuance of an oil and gas lease applied for pursuant to the Act of May 21, 1930, 30 U.S.C. § 301 *et seq.* (1970), for lands underlying a railroad right-of-way granted under the Act of Mar. 3, 1875, when the lands traversed by the right-of-way were later patented without a reservation for minerals. In such case title to the mineral estate underlying the right-of-way is no longer held by the United States and, therefore, a lease issued pursuant to the 1930 Act is void and must be canceled.----- 195
- STIPULATIONS**
1. Applicants for oil and gas leases may be required to accept a stipulation as reasonable and in the public interest and in accord with national and departmental policy, which stipulation requires lessees to engage the services of a qualified professional archaeologist to conduct a survey of the areas to be disturbed for evidences of archaeological or historic sites or materials with the cost to be borne by the lessees, but such archaeologist is not required to work only under the authority of a current Antiquities Act permit.--- 666

**PATENTS OF PUBLIC LANDS****GENERALLY**

1. An application for patent to school lands in place, pursuant to 43 U.S.C. § 871a (1970), which request an exclusion of the right-of-way granted under the Act of July 1, 1862, as amended July 2, 1864, must be rejected. Such a patent must be issued "subject to" the right-of-way----- 364
2. In the absence of legislation by Congress, a patent from the United States does not convey an implied easement by way of necessity across public land----- 518

**EFFECT**

1. The Bureau of Land Management has the authority to impose a stipulation on an oil and gas lease covering reserved minerals on patented lands, which would require archaeological investigation and excavations by lessee----- 666

**PRACTICE BEFORE THE DEPARTMENT**

(See also Rules of Practice.)

**PERSONS QUALIFIED TO PRACTICE**

1. An individual not otherwise entitled to practice before the Department who is a full-time employee of two affiliated corporations may represent the corporations before the Department on the basis of the regulation (predicated upon statutory authority), which provides that an officer or a full-time employee of a corporation is qualified to practice before the De-

**PRACTICE BEFORE THE DEPARTMENT—Continued****PERSONS QUALIFIED TO PRACTICE—Continued**

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partment on behalf of the corporation with respect to a particular matter--- 131

**PRIVACY ACT**

1. Where it does not appear that the notice required by sec. 7(b) of the Privacy Act of 1974 regarding the disclosure of a social security number was given, an oil and gas lease offer on a drawing card filed in a simultaneous drawing procedure should not be considered defective solely because the applicant omitted designating the social security number on the card as provided thereon----- 507

**RAILROAD GRANT LANDS**

1. Legal title, although not record title, to granted lands passes to a railroad under a railroad land grant act upon the filing of a map of definite location of the railroad and such title is subject to divestiture by adverse possession under state laws prior to the issuance of patent to the granted lands----- 1
2. Where land within the primary limits of a railroad land grant is excluded or reserved by the terms of the granting act, the adverse possession of one who asserts only that he has satisfied the statute of limitations of a particular State will not divest the United States of its title or invest the adverse possessor with any interest in the land----- 1

RAILROAD GRANT LANDS—Con.

3. Where land within the primary limits of a railroad land grant is not excluded or reserved by the terms of the granting act, the statute operates to vest title in the railroad at the time the railroad qualifies to receive it. It is a grant *in praesenti*, regardless of whether the United States has issued its patent or certificate... 1
4. Lands known to be mineral in character (except for coal or iron) at the time of definite location of a railroad are excluded from the grant of place lands to the railroad even though the lands may later lose their mineral character... 1
5. The period for determination by the Department of the Interior whether public land included within the primary limits of a legislative grant-in-aid of the construction of a railroad which excepts mineral land is mineral in character extends to the time of issuance of patent to the railroad company... 1
6. Where the purchaser from the railroad of unpatented land believed at the time of his purchase that the land was mineral, and there was physical evidence of its mineral character, or if conditions were such that the purchaser should have known then that the land was excepted from the grant to the railroad, he was not a purchaser in good faith within the "innocent purchaser" proviso of sec-

RAILROAD GRANT LANDS—Con.

- tion 321(b) of the Transportation Act of 1940.... 1
7. When the Department of the Interior finds that public land within the place limits of a legislative grant-in-aid of the construction of a railroad was mineral in character and the railroad company challenges such finding, a hearing should be granted at which the Department has the obligation of making a prima facie case of mineral character, whereupon the company has the burden of establishing nonmineral character by a preponderance of the evidence... 2
8. Although the grants of a right-of-way to a railroad under sec. 2 of the Act of July 1, 1862, and of title to odd-numbered sections of land under section 3 of that Act were grants *in praesenti*, the railroad's interest in the right-of-way land stems solely from sec. 2. There is no difference in its interest in portions of the right-of-way land which cross even-numbered sections of land and in portions which cross odd-numbered sections. Minerals underlying the right-of-way were reserved to the United States in both instances... 80
9. The Secretary of the Interior does not have authority under the Right-of-Way Oil and Gas Leasing Act of May 21, 1930, 30 U.S.C. § 301 *et seq.* (1970), to dispose of

## RAILROAD GRANT LANDS—Con.

deposits of oil and gas underlying a railroad right-of-way granted pursuant to the Act of Mar. 3, 1875, when the lands traversed by the right-of-way were later patented under the Act of Apr. 24, 1820, without any reservation for minerals. In such case, title to the mineral estate was included within the grant to the patentee.....

195

10. A railroad right-of-way, granted under the Act of July 1, 1862, 12 Stat. 489, *as amended* by Act of July 2, 1864, 13 Stat. 356, crossing a school section, does not constitute lands "otherwise disposed of by the United States" within the ambit of the school indemnity statutes. Therefore a rejection of an indemnity selection application, offering such base, is proper.....

364

## REGULATIONS

(See also Administrative Procedure.)

## APPLICABILITY

1. To the extent they do not vitiate the purposes or provisions of the Alaska Native townsit law, the provisions of the non-Native Alaska townsit law are to be applied in the disposition of Native townsit lands; in such cases, references to the Act of Mar. 3, 1891, 43 U.S.C. § 732 (1970), in the documents relating to a Native townsit are not *pro forma*, and the non-Native townsit provisions may be applied..

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## RES JUDICATA

1. A federal district court jury verdict in a suit to cancel desert land patents, that the entrymen and their purchaser under an illegal executory contract did not commit fraud against the United States, does not collaterally estop this Department from adjudicating a contest grounded on the illegal executory contract against the purchaser's own entry, because the legal standard applicable in the subsequent contest is different than that in the fraud action—a desert land entry can be subject to cancellation for acts that do not constitute fraud.....

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## RIGHTS-OF-WAY

(See also Indian Lands)

## GENERALLY

1. Where a protest against the United States entering into a compensatory royalty agreement pertaining to oil and gas underlying a railroad right-of-way pursuant to the Act of May 21, 1930, 46 Stat. 373, 30 U.S.C. § 301 *et seq.* (1970), is based upon an assertion that the protestants have title to the oil and gas under the right-of-way, the protest will be properly dismissed if it is found the United States has title to those minerals.....
2. The Act of July 26, 1866, R.S. 2477, 43 U.S.C. § 932 (1970), grants a right-of-way for the construction of highways over public lands not

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RIGHTS-OF-WAY—Continued

GENERALLY—Continued

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reserved for public uses. Where the Bureau of Land Management closes a 400-foot haul road, formerly part of a right-of-way issued to the Oregon State Highway Department on Oregon and California revested land for a material site, without considering the implications of the statute, and appellant submits evidence showing that the road has been used by the public for many years, the decision will be set aside and the case will be remanded for a determination of whether a highway has already been established under the statute or, if not to afford appellant an opportunity to file an application for a right-of-way under 43 CFR 2822.1-2-----

316

3. In the absence of legislation by Congress, a patent from the United States does not convey an implied easement by way of necessity across public land-----

518

4. In order to establish an easement by way of necessity, the requisite necessity must exist at the time of the conveyance. Moreover, if the necessity ceases to exist, the easement also ceases to exist. When other means of access are available, even though less convenient, a way of necessity will not be recognized or the implication becomes subject

RIGHTS-OF-WAY—Continued

GENERALLY—Continued

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to control of other circumstances-----

518

ACT OF MARCH 3, 1875

1. The Secretary of the Interior does not have authority under the Right-of-Way Oil and Gas Leasing Act of May 21, 1930, 30 U.S.C. § 301 *et seq.* (1970), to dispose of deposits of oil and gas underlying a railroad right-of-way granted pursuant to the Act of Mar. 3, 1875, when the lands traversed by the right-of-way were later patented under the Act of Apr. 24, 1820, without any reservation for minerals. In such case, title to the mineral estate was included within the grant to the patentee-----

195

ACT OF JANUARY 21, 1895

1. A decision by the Bureau of Land Management rejecting a logging road right-of-way application as not in the public interest will be affirmed in the absence of sufficient reasons to the contrary-----

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ACT OF MARCH 4, 1911

1. Under 43 U.S.C. § 961 (1970) and 43 CFR 2802.1-7(a), an applicant has no right to a hearing in connection with original charges for use and occupancy of a communication site, and a hearing pursuant to a request under 43 CFR 4.415 will not be granted where applicant fails to make specific allegations or offer specific proof to show in what factors a Departmental appraisal is in error-----

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## RIGHTS-OF-WAY—Continued

## ACT OF MARCH 4, 1911—Continued Page

2. Without convincing evidence that charges prescribed under 43 U.S.C. § 961 (1970) and 43 CFR 2802.1-7 for use and occupancy of a communication site are excessive, charges properly prescribed by an authorized officer will be sustained on appeal.----- 332
3. Department regulation 43 CFR 2802.1-7 contemplates that a charge will be initially established for the entire term of the grant of a communication site right-of-way----- 332

## APPLICATIONS

1. The Act of July 26, 1866, R.S. 2477, 43 U.S.C. § 932 (1970), grants a right-of-way for the construction of highways over public lands not reserved for public uses. Where the Bureau of Land Management closes a 400-foot haul road, formerly part of a right-of-way issued to the Oregon State Highway Department on Oregon and California revested land for a material site, without considering the implications of the statute, and appellant submits evidence showing that the road has been used by the public for many years, the decision will be set aside and the case will be remanded for a determination of whether a highway has already been established under the statute or, if not to afford appellant an opportunity to file an application for

## RIGHTS-OF-WAY—Continued

## APPLICATIONS—Continued Page

- a right-of-way under 43 CFR 2822.1-2----- 316
  2. A decision by the Bureau of Land Management rejecting a logging road right-of-way application as not in the public interest will be affirmed in the absence of sufficient reasons to the contrary-- 518
- NATURE OF INTEREST GRANTED
1. Although the grants of a right-of-way to a railroad under sec. 2 of the Act of July 1, 1862, and of title to odd-numbered sections of land under section 3 of that Act were grants *in praesenti*, the railroad's interest in the right-of-way land stems solely from sec. 2. There is no difference in its interest in portions of the right-of-way land which cross even-numbered sections of land and in portions which cross odd-numbered sections. Minerals underlying the right-of-way were reserved to the United States in both instances-- 80
  2. Title to the oil and gas deposits underlying the right-of-way granted to a railroad by the Act of July 1, 1862, 12 Stat. 489, did not pass under a patent to the land that the right-of-way crosses. Rather, title remains in the United States----- 80
  3. The Secretary of the Interior does not have authority under the Right-of-Way Oil and Gas Leasing Act of May 21, 1930, 30 U.S.C. § 301 *et seq.* (1970), to dispose of deposits of oil and gas underlying a railroad

**RIGHTS-OF-WAY—Continued**

**NATURE OF INTEREST GRANTED—Continued**

right-of-way granted pursuant to the Act of Mar. 3, 1875, when the lands traversed by the right-of-way were later patented under the Act of Apr. 24, 1820, without any reservation for minerals. In such case, title to the mineral estate was included within the grant to the patentee.....

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**RULES OF PRACTICE**

(See also Appeals, Contests and Protests, Contracts, Federal Coal Mine Health and Safety Act of 1969, Hearings, Indian Probate, Practice Before the Department.)

**GENERALLY**

1. A stipulation as to procedure only involving two appeals arising under the same contract is disregarded where following the submission of simultaneous briefs under a cross motions for summary judgment procedure, the Board finds some of the terms of the stipulation in which it had acquiesced to be at variance with the rule in the Court of Claims against the splitting of the cause of action under a single and indivisible contract and that adherence to the stipulation could be prejudicial to the contractor in certain foreseeable circumstances. The stay of proceedings provided for by the stipulation with respect to one appeal is therefore vacated and as a corollary to such action the appel-

**RULES OF PRACTICE—Continued**

**GENERALLY—Continued**

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- lant is directed to file its complaint.....
2. Finding that it has inherent discretion to order consolidation of appeals in appropriate cases, the Board orders the consolidation of two appeals which the appellant has asserted involve common questions of law and fact and which, in any event, arose under the same contract, involve the same attorneys and, presumably, the same witnesses.....

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**APPEALS**

**Generally**

1. A stipulation as to procedure only involving two appeals arising under the same contract is disregarded where following submission of simultaneous briefs under a cross motions for summary judgment procedure, the Board finds some of the terms of the stipulation in which it had acquiesced to be at variance with the rule in the Court of Claims against the splitting of the cause of action under a single and indivisible contract and that adherence to the stipulation could be prejudicial to the contractor in certain foreseeable circumstances. The stay of proceedings provided for by the stipulation with respect to one appeal is therefore vacated and as a corollary to such action the appellant is directed to file its complaint.....

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## RULES OF PRACTICE—Continued

## APPEALS—Continued

## Generally—Continued

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2. Finding that it has inherent discretion to order consolidation of appeals in appropriate cases, the Board orders the consolidation of two appeals which the appellant has asserted involve common questions of law and fact and which, in any event, arose under the same contract, involve the same attorneys and, presumably, the same witnesses----- 148
3. Upon appeal from a decision of an Administrative Law Judge, the Board of Land Appeals may make all findings of fact and conclusions of law based upon the record just as though it were making the decision in the first instance----- 185
4. Since the Bureau of Land Management has no authority to issue a public land order withdrawing land, such authority existing only in the Secretary, the Under Secretary, and the Assistant Secretaries of the Department of the Interior, recommendations by officers of the Bureau of Land Management relating to withdrawals are not subject to review under the provisions of 43 CFR 4.450-2 or 43 CFR 4.410----- 313

## Dismissal

1. Where a construction contractor failed to appeal from a notice of termination for default which included findings that the

## RULES OF PRACTICE—Continued

## APPEALS—Continued

## Dismissal—Continued

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- contractor's delay in performing the work was not due to excusable causes, but did file a timely appeal from a damage assessment for, *inter alia*, the increased cost of completing the work, the Board denied the Government's motion to strike paragraphs of the complaint alleging that the contractor's delay was due to excusable causes and that the termination for default was improper since under the so-called *Fulford* doctrine, which has been held equally applicable to construction contracts, an appeal from a damage or excess cost assessment following a termination for default allows the contractor to contest the propriety of the termination----- 137
2. Where certain paragraphs of a complaint filed by a construction contractor in an appeal from a damage assessment following a termination for default raised issues as to the propriety of the termination, the Board denied a Government motion to strike those paragraphs based on contentions that the contractor had agreed that delay in completion of the work was not excusable and that the contractor's agreement to a revised date for completion of the work precluded it from raising issues as to the excusability of delays

**RULES OF PRACTICE—Continued**

**APPEALS—Continued**

**Dismissal—Continued**

occurring prior to the agreement, since it is well settled that accord and satisfaction is an affirmative defense which must be pleaded and proved and that allegations of accord and satisfaction raise factual issues as to the intent of the parties at the time of the alleged accord.....

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3. An appeal by a concessionaire at a wildlife refuge who alleges that Government harassment of the public, failure to repair roads and other actions resulted in a decrease of business and who seeks therefor to be relieved of payment of a semi-annual franchise fee of 3 percent of gross receipts required under the concession agreement and given the right to sell beer, *inter alia*, is dismissed for lack of jurisdiction, since the agreement contains no adjustment provisions and the relief requested entails reformation of the agreement, but is remanded to the contracting officer, who has wide discretion under the agreement to provide relief, for further consideration in the light of the Board's opinion.....

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**Failure to Appeal**

1. Where a construction contractor failed to appeal from a notice of termination for default which included findings that the contractor's delay in performing the work was not

**RULES OF PRACTICE—Continued**

**APPEALS—Continued**

**Failure to Appeal—Con.**

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due to excusable causes, but did file a timely appeal from a damage assessment for, *inter alia*, the increased cost of completing the work, the Board denied the Government's motion to strike paragraphs of the complaint alleging that the contractor's delay was due to excusable causes and that the termination for default was improper since under the so-called *Fulford* doctrine, which has been held equally applicable to construction contracts, an appeal from a damage or excess cost assessment following a termination for default allows the contractor to contest the propriety of the termination.....

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**Hearings**

1. Cross motions for summary judgment are denied where the Board finds the stipulated record furnishes an insufficient basis for an informed judgment and that a hearing will be required for determining the merits of the entitlement question presented for decision.....
2. The regulations do not provide for hearings as a matter of right on trespass violations involving a section 15 grazing lessee. For the Board of Land Appeals to exercise its discretion under 43 CFR 4.415 and order a hearing, the appellant must allege facts which,

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## RULES OF PRACTICE—Continued

## APPEALS—Continued

## Hearings—Continued

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- if proved, would entitle him to the relief sought... 269
3. A request for a hearing pursuant to 43 CFR 4.415 for the purpose of taking testimony on the Bureau of Land Management's "continued refusal" to restore land in a reclamation withdrawal to entry will be denied. An appeal from a decision declaring mining claims and mill-sites null and void ab initio because the lands are in the withdrawal may not serve as the vehicle for petitioning the Secretary of the Interior to revoke the withdrawal. Furthermore, even if the withdrawal were revoked and the lands opened to entry, this action could not revive mining claims which were void when located while the withdrawal was in effect and the land closed to entry under the mining laws... 275
4. It is within the discretion of the Board of Land Appeals to grant a request for a hearing on a question of fact. In order to warrant such a hearing, an appellant must at least allege facts which, if proved, would entitle him to the relief sought... 518

## Motions

1. Where a construction contractor failed to appeal from a notice of termination for default which included findings that the contractor's delay in performing the work was not due to excusable causes,

## RULES OF PRACTICE—Continued

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## Motions—Continued

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- but did file a timely appeal from a damage assessment for, *inter alia*, the increased cost of completing the work, the Board denied the Government's motion to strike paragraphs of the complaint alleging that the contractor's delay was due to excusable causes and that the termination for default was improper since under the so-called *Fulford* doctrine, which has been held equally applicable to construction contracts, an appeal from a damage or excess cost assessment following a termination for default allows the contractor to contest the propriety of the termination..... 137
2. Where certain paragraphs of a complaint filed by a construction contractor in an appeal from a damage assessment following a termination for default raised issues as to the propriety of the termination, the Board denied a Government motion to strike those paragraphs based on contentions that the contractor had agreed that delay in completion of the work was not excusable and that the contractor's agreement to a revised date for completion of the work precluded it from raising issues as to the excusability of delays occurring prior to the agreement, since it is well settled that accord

## RULES OF PRACTICE—Continued

## APPEALS—Continued

## Motions—Continued

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and satisfaction is an affirmative defense which must be pleaded and proved and that allegations of accord and satisfaction raise factual issues as to the intent of the parties at the time of the alleged accord-----

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3. Cross motions for summary judgment are denied where the Board finds the stipulated record furnishes an insufficient basis for an informed judgment and that a hearing will be required for determining the merits of the entitlement question presented for decision-----

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4. A stipulation as to procedure only involving two appeals arising under the same contract is disregarded where following the submission of simultaneous briefs under a cross motions for summary judgment procedure, the Board finds some of the terms of the stipulation in which it had acquiesced to be at variance with the rule in the Court of Claims against the splitting of the cause of action under a single and indivisible contract and that adherence to the stipulation could be prejudicial to the contractor in certain foreseeable circumstances. The stay of proceedings provided for by the stipulation with respect to one appeal is therefore vacated and as a corollary to such action

## RULES OF PRACTICE—Continued

## APPEALS—Continued

## Motions—Continued

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the appellant is directed to file its complaint----

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5. Finding that it has inherent discretion to order consolidation of appeals in appropriate cases, the Board orders the consolidation of two appeals which the appellant has asserted involve common questions of law and fact and which, in any event, arose under the same contract, involve the same attorneys and, presumably, the same witnesses.

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## Reconsideration

1. Where in moving for reconsideration of a decision denying its claim for constructive acceleration, the contractor contended that the Bureau's failure to promptly investigate its claim of delay due to unusually severe weather amounted to a denial of a request for a time extension and that the denial plus other actions of Bureau inspectors constituted an order to complete the work by the specified completion date irrespective of excusable delay and thus was an acceleration order, the Board ruled that a denial of a request for a time extension was insufficient in and of itself to constitute constructive acceleration and reviewing the evidence, affirmed the denial of the claim, holding that the actions of the inspectors were regarded as suggestions by the contractor and ac-

# **RULES OF PRACTICE—Continued** **APPEALS—Continued**

## **Reconsideration—Con.**

cepted or rejected depending on whether the suggestions were practical or economical.-----

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2. Where a petition for reconsideration of a previous Board decision applying departmental contest procedures to Alaska Native allotment applications fails to show that the original decision was erroneous in any matter, the original decision will be sustained.-----

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## **Standing to Appeal**

1. A city organized under Alaska State law has standing to appeal from the rejection of its application for townsite deeds to land within its city limits, and the awarding of deeds to occupants of the townsite lots at the time of final subdivisional survey.-----

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2. One having no right or privilege to the use or possession of Indian lands by way of a lease, permit or license has no standing to appeal under 25 CFR Part 2.-----

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## **GOVERNMENT CONTESTS**

1. A federal district court jury verdict in a suit to cancel desert land patents, that the entrymen and their purchaser under an illegal executory contract did not commit fraud against the United States, does not collaterally estop this Department from adjudicating a contest grounded on the illegal executory contract against the purchaser's own entry, because the legal standard

# **RULES OF PRACTICE—Continued** **GOVERNMENT CONTESTS—Con.**

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applicable in the subsequent contest is different than that in the fraud action—a desert land entry can be subject to cancellation for acts that do not constitute fraud.-----

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2. In the case of a desert land entry contestee who violates the 320-acre limitation on holding desert land because he is the "purchaser" of two other 320-acre entries under an illegal executory contract to convey after patent, all entries held by the "purchaser" are subject to cancellation, and the Department may proceed by way of contest against the "purchaser's" own entry, which was not a subject of the illegal contract.-----

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3. Where the Bureau of Land Management determines that an Alaska Native allotment application should be rejected because the land was not used and occupied by the applicant, the BLM shall issue a contest complaint pursuant to 43 CFR 4.451 *et seq.* Upon receiving a timely answer to the complaint, which answer raises a disputed issue of material fact, the Bureau will forward the case file to the Hearings Division, Office of Hearings and Appeals, Department of the Interior, for assignment of an Administrative Law Judge, who will proceed to schedule a hearing at which the applicant may produce evidence to establish

## RULES OF PRACTICE—Continued

## GOVERNMENT CONTESTS—Con.

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entitlement to his allotment.....

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4. In a mining contest, a matter not charged in the complaint may only be considered by the Administrative Law Judge if it was raised at the hearing without objection and the contestee was fully aware that the issue was raised.....

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## HEARINGS

1. When the Department of the Interior finds that public land within the place limits of a legislative grant-in-aid of the construction of a railroad was mineral in character and the railroad company challenges such finding, a hearing should be granted at which the Department has the obligation of making a prima facie case of mineral character, whereupon the company has the burden of establishing nonmineral character by a preponderance of the evidence.....

2

2. A request for a hearing pursuant to 43 CFR 4.415 for the purpose of taking testimony on the Bureau of Land Management's "continued refusal" to restore land in a reclamation withdrawal to entry will be denied. An appeal from a decision declaring mining claims and mill-sites null and void ab initio because the lands are in the withdrawal may not serve as the vehicle for petitioning the Secretary of the Interior to revoke the withdrawal.....

## RULES OF PRACTICE—Continued

## HEARINGS—Continued

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Furthermore, even if the withdrawal were revoked and the lands opened to entry, this action could not revive mining claims which were void when located while the withdrawal was in effect and the land closed to entry under the mining laws.....

275

3. Under 43 U.S.C. § 961 (1970) and 43 CFR 2802.1-7(a), and applicant has no right to a hearing in connection with original charges for use and occupancy of a communication site, and a hearing pursuant to a request under 43 CFR 4.415 will not be granted where applicant fails to make specific allegations or offer specific proof to show in what factors a Departmental appraisal is in error.....

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## PROTESTS

1. It is improper to dismiss a protest against issuance of an oil and gas lease applied for pursuant to the Act of May 21, 1930, 30 U.S.C. § 301 *et seq.* (1970), for lands underlying a railroad right-of-way granted under the Act of Mar. 3, 1875, when the lands traversed by the right-of-way were later patented without a reservation for minerals. In such case title to the mineral estate underlying the right-of-way is no longer held by the United States and, therefore, a lease issued pursuant to the 1930 Act is void and must be canceled.....

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## SCHOOL LANDS

## GENERALLY

1. When title to an entire in-place school section has passed to the state, the United States no longer has a property interest therein and the land is no longer subject to location under the mining laws----- 275
2. An application for patent to school lands in place, pursuant to 43 U.S.C. § 871a (1970), which requests an exclusion of the right-of-way granted under the Act of July 1, 1862, *as amended* July 2, 1864, must be rejected. Such a patent must be issued "subject to" the right-of-way----- 364
3. A State is entitled to indemnity for school lands which it did not acquire by reason of a fractional township. Where the fractional township is created by reason of the incursion of a navigable body of water, the State, by taking indemnity does not hereby grant to the United States the bed of the navigable body of water----- 557

## INDEMNITY SELECTIONS

1. A railroad right-of-way, granted under the Act of July 1, 1862, 12 Stat. 489, *as amended* by Act of July 2, 1864, 13 Stat. 356, crossing a school section, does not constitute lands "otherwise disposed of by the United States" within the ambit of the school indemnity statutes. Therefore a rejection of an indemnity selection application, of-

## SCHOOL LANDS—Continued

## INDEMNITY SELECTIONS—Continued Page

- fering such base, is proper----- 364
2. A State is entitled to indemnity for school lands which it did not acquire by reason of a fractional township. Where the fractional township is created by reason of the incursion of a navigable body of water. The State, by taking indemnity does not hereby grant to the United States the bed of the navigable body of water----- 557

## SECRETARY OF THE INTERIOR

1. Since the Bureau of Land Management has no authority to issue a public land order withdrawing land, such authority existing only in the Secretary, the Under Secretary and the Assistant Secretaries of the Department of the Interior, recommendations by officers of the Bureau of Land Management relating to withdrawals are not subject to review under the provisions of 43 CFR 4.450-2 or 43 CFR 4.410----- 313
2. The Secretary has authority to correct an erroneous government survey under 43 U.S.C. § 2(1970)----- 529

## STATE LANDS

1. The States possess dominion over the beds of all navigable streams within their borders----- 557
2. An oil and gas offer embracing land in the bed of a navigable river, which is State land, is properly rejected----- 557

## STATE LAWS

1. Possession of federal land for the period of a state's statute of limitations, which may create title rights in an adverse possessor to nonfederal land, cannot affect the title of land belonging to the United States. Where there is no other acceptable basis for a belief that a claimant has title other than mere adverse possession under such a state law, there is no claim or color of title recognizable under the Color of Title Act, 43 U.S.C. § 1068 (1970)-----

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## STATE SELECTIONS

(See also School Lands.)

1. A railroad right-of-way, granted under the Act of July 1, 1862, 12 Stat. 489, as amended by Act of July 2, 1864, 13 Stat. 356, crossing a school section, does not constitute lands "otherwise disposed of by the United States" within the ambit of the school indemnity statutes. Therefore a rejection of an indemnity selection application, offering such base, is proper-----

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## STATUTES

1. The Bureau of Land Management has the authority to impose a stipulation on an oil and gas lease covering reserved minerals on patented lands, which would require archaeological investigation and excavations by lessee-----

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## STATUTORY CONSTRUCTION

## GENERALLY

1. Sec. 5(b) of the Act of May 25, 1948 (62 Stat. 269) is not applicable to those tribal lands upon which the Flathead Irrigation Project's Kerr Substation and Switchyard are located...

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## TETON DAM DISASTER

## ASSISTANCE ACT

## LOSS OF PROPERTY

1. Congress, by including the word "directly" as the modifier of "resulting" in sec. 2 of the Teton Dam Disaster Assistance Act, Sept. 7, 1976, 90 Stat. 1211, so as to provide that all persons suffering loss of property "directly resulting" from the failure of that dam are entitled to receive full compensation from the United States, limited the scope of the Government's liability for claims under the Act-----
2. The laws of the State of Idaho, utilized pursuant to sec. 3(a) of the Teton Dam Disaster Assistance Act, Sept. 7, 1976, 90 Stat. 1211, provide that remote damages are not compensable. Where alleged damages in lost tourist business are predicated on the washing out of a portion of a highway some 50 miles south of the appellant's resort, such damages are too remote to permit recovery.

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## TITLE

## GENERALLY

1. The Secretary of the Interior does not have authority under the Right-of-Way Oil and Gas Leasing Act of May 21, 1930, 30

**TITLE—Continued****GENERALLY—Continued**

U.S.C. § 301 *et seq.* (1970), to dispose of deposits of oil and gas underlying a railroad right-of-way granted pursuant to the Act of Mar. 3, 1875, when the lands traversed by the right-of-way were later patented under the Act of Apr. 24, 1820, without any reservation for minerals. In such case, title to the mineral estate was included within the grant to the patentee-----

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2. In public land law, the term "equitable title" is used to describe the interest held by an entryman who, upon full compliance with requirements of the law, has rights in the land superior to all other claims, and is entitled to issuance of patent by the Federal government, which holds only legal title to the land-----

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**TOWNSITES**

1. The date determinative of the rights of occupants of Alaska Native townsite land is the date of final subdivisional survey, not the date of patent; if, at the date of final subdivisional survey, the lots are occupied by non-Natives as well as Natives, the lots will be disposed of under both the non-Native and Native townsite provisions.

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**TRESPASS****GENERALLY**

1. Where timber on Federal land is cut for commercial purposes by one who knows that no patent has issued and who oc-

**TRESPASS—Continued****GENERALLY—Continued**

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cupies the land either as a mining claimant or as one who is engaged in attempting to defeat the interests of third parties by adverse possession, the taking of the timber constitutes a willful trespass against the interests of the United States. If the taking occurs after a State court has issued its decree quieting title in the timber-taker against all third parties but not against the United States, the taking will nonetheless constitute a trespass if it is determined that legal title had not passed from the United States by operation of law-----

3

2. The term "grazing trespass" as used in the context of the Federal Range Code refers to the grazing of livestock on federal land without an appropriate license or permit or in violation of the terms and conditions of a license or permit, and not to any other special meaning ascribed under other laws and circumstances if inconsistent with this usage-----

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3. Where a permittee was found to have committed repeated grazing trespasses, a fine of twice the commercial rate for foraging such animals was warranted in accordance with the regulations-----

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4. Where a grazing trespass is willful, grossly negligent, or repeated, disciplinary action in the form of suspension, reduction, or revocation, or denial of

**TRESPASS—Continued**

**GENERALLY—Continued**

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|---|-----|
| renewal of a grazing license or permit may be warranted. The regulatory factors, together with any mitigating circumstances, should be considered to determine the extent of the reduction or other disciplinary action.....  | 185 |
| 5. In determining whether grazing trespasses are "willful," intent sufficient to establish willfulness may be shown by proof of facts which objectively show that the circumstances do not comport with the notion that the trespasser acted in good faith or innocent mistake, or that his conduct was so lacking in reasonableness or responsibility that it became reckless or negligent.....  | 185 |
| 6. When the holder of a grazing lease is found to have violated regulations and the terms of his lease because his cattle have trespassed on Federal land, his lease may be canceled when lesser sanctions have proved to be of no effect or when the nature of the violation demands such severity. However, a decision canceling a lease will be set aside where the District Manager relied upon alleged trespasses of which the lessees had no notice and which occurred after a show cause notice had issued, and the case will be remanded for further proceedings..... | 269 |

**WAIVER**

1. Cashing of an oil and gas rental check, received more than 20 days after due, does not constitute a waiver which would permit reinstatement of a terminated lease in violation of 30 U.S.C. § 188(c) (1970), despite wording on the check that "by endorsement this check when paid is accepted in full payment \* \* \*"

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**WILDERNESS ACT**

1. Public lands in national forests are presently open to oil and gas leasing regardless of whether they are part of an officially designated wilderness area. However, where the land is within such an established wilderness area, the Secretary of Agriculture has the statutory authority to prescribe reasonable stipulations for the protection of the wilderness character of the land consistent with the use of the land for the purpose of the lease, although only the Secretary of the Interior may close the land to leasing or prohibit the issuance of a lease.....

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**WITHDRAWALS AND RESERVATIONS**

**GENERALLY**

1. A request for a hearing pursuant to 43 CFR 4.415 for the purpose of taking testimony on the Bureau of Land Management's "continued refusal" to restore land in a reclamation withdrawal to entry will be denied. An appeal

# WITHDRAWALS AND RESERVATIONS—Continued

## GENERALLY—Continued

from a decision declaring mining claims and mill-sites null and void ab initio because the lands are in the withdrawal may not serve as the vehicle for petitioning the Secretary of the Interior to revoke the withdrawal. Furthermore, even if the withdrawal were revoked and the lands opened to entry, this action could not revive mining claims which were void when located while the withdrawal was in effect and the land closed to entry under the mining laws---

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2. Sec. 5(b) of the Act of May 25, 1948 (62 Stat. 269) is not applicable to those tribal lands upon which the Flathead Irrigation Project's Kerr Substation and Switchyard are located---

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## AUTHORITY TO MAKE

1. Since the Bureau of Land Management has no authority to issue a public land order withdrawing land, such authority existing only in the Secretary, the Under Secretary, and the Assistant Secretaries of the Department of the Interior, recommendations by officers of the Bureau of Land Management relating to withdrawals are not subject to review under the provisions of 43 CFR 4.450-2 or 43 CFR 4.410-----

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## EFFECT OF

1. A color of title application for land which has been withdrawn for a stock-

# WITHDRAWALS AND RESERVATIONS—Continued

## EFFECT OF—Continued

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driveway prior to any conveyance in a color of title applicant's chain of title is properly rejected as to such land-----

23

2. Mining claims located on land withdrawn from all forms of entry are null and void from the beginning-----

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## RECLAMATION WITHDRAWALS

1. Mining claims and mill-sites located upon land which has been previously withdrawn from entry under the mining laws by a first-form reclamation withdrawal are void ab initio. Because Departmental Order No. 2515 delegated authority to revoke such a withdrawal to the Bureau of Reclamation with the concurrence of the Bureau of Land Management, the land remains withdrawn from mining locations when the Bureau of Land Management does not concur with the recommendation of the Bureau of Reclamation to revoke the withdrawal and restore the land to entry-----

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2. A request for a hearing pursuant to 43 CFR 4.415 for the purpose of taking testimony on the Bureau of Land Management's "continued refusal" to restore land in a reclamation withdrawal to entry will be denied. An appeal from a decision declaring mining claims and mill-sites null and void ab initio because the lands are in the withdrawal may not serve as the vehicle

**WITHDRAWALS AND RESERVATIONS—Continued**

**RECLAMATION WITHDRAWALS—Con. Page**

for petitioning the Secretary of the Interior to revoke the withdrawal. Furthermore, even if the withdrawal were revoked and the lands opened to entry, this action could not revive mining claims which were void when located while the withdrawal was in effect and land closed to entry under the mining laws-----

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**REVOCAION AND RESTORATION**

1. A request for a hearing pursuant to 43 CFR 4.415 for the purpose of taking testimony on the Bureau of Land Management's "continued refusal" to restore land in a reclamation withdrawal to entry will be denied. An appeal from a decision declaring mining claims and mill-sites null and void ab initio because the lands are in the withdrawal may not serve as the vehicle for petitioning the Secretary of the Interior to revoke the withdrawal. Furthermore, even if the withdrawal were revoked and the lands opened to entry, this action could not revive mining claims which were void when located while the withdrawal was in effect and the land closed to entry under the mining laws---

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**SPRINGS AND WATERHOLES**

1. Even though springs and waterholes withdrawn from mineral entry by Executive Order No. 107 may not be in use, they nevertheless remain withdrawn so long as they

**WITHDRAWALS AND RESERVATIONS—Continued**

**SPRINGS AND WATERHOLES—Con. Page**

provide sufficient water for public watering purposes-----

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**STOCK-DRIVEWAY WITHDRAWALS**

1. A color of title application for land which has been withdrawn for a stock-drive-way prior to any conveyance in a color of title applicant's chain of title is properly rejected as to such land-----

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**WORDS AND PHRASES**

1. "*Agent.*" The word "agent," as used in 43 CFR 3102.6-1 requiring statements of authority and disclosure of interests in oil and gas lease offers by agents, does not include an employee who has no discretionary authority and merely acts as the employer's amanuensis in affixing the employer's stamp on a simultaneous oil and gas lease offer entry card, even if it is done outside the actual physical presence of the employer. Any statement required by the Bureau of Land Management to establish the identity of the person who stamped the offeror's name on the card must allow the offeror to provide information to establish whether or not the person was an agent within the meaning of 43 CFR 3102.6-1; merely requiring the offeror to show the stamp was affixed by him or in his presence is not sufficient-----

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## WORDS AND PHRASES—Con.

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2. "Grazing trespass." The term "grazing trespass" as used in the context of the Federal Range Code refers to the grazing of livestock on federal land without an appropriate license or permit or in violation of the terms and conditions of a license or permit, and not to any other special meaning ascribed under other laws and circumstances if inconsistent with this usage ----- 185
3. "Hold by assignment or otherwise." The purchaser of desert land under an illegal executory contract to convey the land subsequent to patent "holds" that land within the meaning of the acreage limitation of section 7 of the Desert Land Act, as amended, 43 U.S.C. § 329 (1970) ----- 281
4. "Innocent Purchaser." Where the purchaser from the railroad of unpatented land believed at the time of his purchase that the land was mineral, and there was physical evidence of its mineral character, or if conditions were such that the purchaser should have known then that the land was excepted from the grant to the railroad, he was not a purchaser in good faith within the "innocent purchaser" proviso of section 321(b) of the Transportation Act of 1940 ----- 1

## WORDS AND PHRASES—Con.

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5. "Public lands" are defined in sec. 3(e) of the Alaska Native Claims Settlement Act, as follows: "Public lands" means all Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation, and (2) land selections of the State of Alaska which have been patented or tentatively approved under sec. 6(g) of the Alaska Statehood Act, as amended (72 Stat. 341, 77 Stat. 223), or identified for selection by the State prior to Jan 17, 1969. The "except" clause contained in the definition of public lands in sec. 3(c) of ANCSA must be read as an expression of Congressional intent not to include particular lands rather than as an "exception" from lands included in the general definition of public lands ----- 462
6. "Such permit" as used in sec. 3 of the Taylor Grazing Act, 43 U.S.C. § 315b (1970), providing for a renewal of a grazing permit does not mean only a permit identical with the terms and provisions of the original ----- 543